Supreme Court, U.S.
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05-99

NO._____

IN THE SUPREME COURT
OF THE UNITED STATES

Richard Ducote,
Petitioner
vs.
Andrew Titelman, Craig Chandler, John Mayoue, Pamela Gray, and Diane Woods,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT - CASE NO. 03-14429

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Did the Court of Appeals err in failing to squarely address the question of whether the legal arguments advanced in the trial court by the Petitioner, who was sanctioned $84, 905.55 under Rule 11, F.R.C.P., to distinguish *Monroe v. Sigler*, 353 S.E.2d 23 (Ga. 1987) from the instant case were reasonable or nonfrivolous ?

2) Did the Court of Appeals err by rejecting the Petitioner's legal arguments attempting to distinguish *Monroe v. Sigler* from the instant case solely because the arguments cited Georgia intermediate appellate court decisions and dissenting opinions, none of which "actually create the exceptions to Monroe that [Petitioner] seeks to invoke" ?

3) Were Petitioner's legal arguments attempting to distinguish *Monroe v. Sigler* from the instant case so unreasonable as to invoke sanctions under Rule 11, F.R.C.P.?

LIST OF PARTIES & CORPORATE DISCLOSURE STATEMENT

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Wendy Jane Titelman
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CITATIONS TO OPINIONS AND ORDERS BELOW

Michael Hirsh and Richard Ducote v. Andrew Charles Titelman, Craig Chandler, et al., No. 03-14429, U.S. Court of Appeals for the Eleventh Circuit, February 8, 2005. Unreported. 2005 U.S.App. LEXIS 11350 [51-A]. Rehearing denied April 15, 2005 [63-A].

Wendy Jane Titelman v. Andrew Charles Titelman, Craig Chandler, et al, Civil Action No. 1:01-CV-1845-JOF. September 17, 2001 [1-A]; July 29, 2003 [31-A]; July 30, 2005 [49-A]. Unreported.

BASIS OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1) to review the Court of Appeals decision rendered on February 8, 2005. Rehearing and rehearing *en banc* was sought by Petitioner on March 1, 2005, and denied on April 15, 2005. The District Court exercised jurisdiction over the malicious prosecution complaint under 28 U.S.C § 1332.

RELEVANT STATUTE

Rule 11, F.R.C.P. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions [Relevant excerpts]

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the

attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An undersigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, and attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and...

(c) Sanctions. If after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation [emphasis added].

STATEMENT OF THE CASE

In this case, Petitioner attorney seeks to reverse the imposition of sanctions against him in the amount of $84, 905.55 by the United States District Court for the Northern District of Georgia on July 30, 2003, under the provisions of Rule 11, F.R.C.P. On July 13, 2001, Petitioner filed a malicious prosecution complaint in the District Court on behalf of Wendy Titelman, a Louisiana citizen, against the Respondents[1] Andrew Titelman, Craig Chandler, John Mayoue, Pamela Gray, and Diane Woods, all Georgia citizens, for malicious prosecution under Ga. Code Ann. § 51-7-40. Jurisdiction was based on diversity of citizenship under 28 U.S.C. §1332. The complaint alleged that the Respondents had maliciously caused her to be falsely prosecuted in the Cobb

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1. Respondent Titelman is Wendy Titelman's ex-husband, Craig Chandler is the law enforcement officer who secured the arrest warrant and testified before the grand jury returning the indictment, John Mayoue and Pamela Gray were Mr. Titelman's attorneys, and Diane Woods was the guardian *ad litem* for the Titelman daughters in the state court child custody case.

County, Georgia, Superior Court for "Interstate Interference With Custody" of her two daughters under the felony provisions of Ga. Code Ann. § 16-5-45 (c)(1). She was tried and acquitted April 21-25, 2001. Following the trial, the jury sent a scathing letter to the District Attorney and to the state court judge presiding over the custody case involving her two daughters condemning her prosecution as baseless. The jury also believed that Respondent Titelman had sexually molested two children, and that Respondent Woods and others had concealed the abuse.

This case turns on certain rulings by the state court judge presiding over the state court criminal trial denying Ms. Titelman's two motions for a directed verdict of acquittal. In *Monroe v. Sigler*, 256 Ga.759, 761, 353 S.E.2d23, 25 (1987), the Georgia Supreme Court held:

> When the trial judge, having heard all of the state's evidence, considers a motion on behalf of the accused (the accused being present and given the opportunity to be heard in support of the motion); and when the trial judge rules that the evidence is sufficient *as a matter of law* to support a conviction (that is, sufficient to enable a rational trier of fact to find each and every element of the guilt of the accused beyond a reasonable doubt), we can see no reason why such a holding- unreversed and in the absence of

> fraud or corruption- should not suffice as to the existence of probable case" [emphasis in original]

Thus, Ms. Titelman would have no valid malicious prosecution case under Georgia law if the judge presiding over her criminal trial had made rulings, in denying her directed acquittal verdict motions, which met the criteria set forth in *Monroe.* However, Judge Robert Flournoy, III the state judge presiding over Ms. Titelman's custody trial, never made any such rulings meeting the Monroe criteria. In the first motion for directed verdict at the close of the State's case on April 26, 2001, Ms. Titelman's attorney argued that she had every right to take her children across the state line, and, therefore, that she could not be convicted under the statute charging her. In response to that argument, Judge Fluornoy simply said the following:

> As to that ground, your directed verdict, I deny it. Okay. What's the next one? What's the next basis for your directed verdict? [4/25/01Transcript excerpt in record below, R-2-45, p. 6].

The next ground urged by Ms. Titelman was that the State did not offer any evidence that Ms. Titelman was unjustified in her actions. Judge Fluornoy's response was simply:

> As to the second ground, I will deny your motion for directed verdict. You have a third one? [4/25/01 Transcript excerpt in record below, R-2-45, p.10].

After the conclusion of Ms. Titelman's defense, she again moved for a directed acquittal. She re-urged the impossibility of a conviction on the basis of the statutory charge under Ga. Code Ann. § 16-5-45 (c)(2), since she clearly had authority to take the children out of Georgia.. She also argued to the court that the state failed to prove anything beyond a reasonable doubt. Judge Fluornoy's response was:

> And so I respect that and–but I deny it...You've got a very– and have put on a very good case to create reasonable doubt, I'll be honest with you...Reasonable doubt is for the jury. You have done Herculian efforts, done an excellent job for helping your client; and you, too, Ms. Hakes, for the State... [4/26/01Transcript excerpts in record below, R-2-45, pp.2-3].

It is clear that Judge Fluornoy never made the finding "*that the evidence is sufficient as a matter of law to support a conviction (that is, sufficient to enable a rational trier of fact to find each and every element of the guilt of the accused beyond a reasonable doubt),*" which triggers the *Monroe* presumption of probable cause. *Monroe, supra.* To the contrary, Judge

Fluornoy's statements appear to acknowledge the reasonable doubt left by the evidence presented by the State.

During the course of the litigation, Petitioner and the District Court Judge Owen Forrester argued over the threshold application of *Monroe* to the facts of this case, as well as the definitions of "fraud" and "corruption" as used in *Monroe*. On August 9, 2002, Judge Forrester dismissed Ms. Titelman's complaint upon the Respondents' Rule 12(b) motions, based on the *Monroe* rationale. On October 29, 2004, the Eleventh Circuit affirmed the dismissal of the suit in a separate appeal [No. 02-14879].

On September 17, 2002, on the Respondent's motions, Judge Forrester issued an Order granting Rule 11 sanctions against Petitioner and Michael Hirsch, his local co-counsel [1-A]. On July 29, 2003, Judge Forrester issued another Order fixing the amount of the Rule 11 sanctions at $84, 905.55, representing the cumulative attorney's fees for the various Respondents [31-A]. On July 30, 2003, a judgment was entered against Petitioner and Mr Hirsh for that total amount [49-A].

Petitioner and Mr. Hirsh appealed. On February 8, 2005, the Eleventh Circuit Court of Appeals affirmed the sanctions award against both attorneys [51-A]. On April 15, 2005, the Court of Appeals denied the petition for rehearing and rehearing en banc [63-A].

> In awarding the sanctions, Judge Forrester stated:
> Although the court is not convinced that Plaintiff forwarded a reasonable argument to distinguish the "mandatory inference" required

> by Monroe, the court finds the lack of factual support for Plaintiff's allegations, as well as its determination that Plaintiff pursued this litigation for the purpose of harassment to be sufficient bases on which to impose sanctions [22-A, fn.1].

In affirming the sanctions, the appellate court did not consider the "improper purpose issue," and only focused on the "reasonable factual or legal basis" question [58-A, fn.2].

The "factual or legal basis" issue involves a rather circular discussion below. When the trial and appellate courts speak of a "reasonable factual basis," the courts mean facts which would show fraud or corruption under *Monroe* [See Opinion, 54-A- 55-A, 57-A- 58-A; District Court Order, 19-A - 22-A]. Therefore, if *Monroe* is inapplicable to begin with because of the inadequacy of Judge Fluornoy's rulings in the criminal trial, there can be no deficient factual issue to support Rule 11 sanctions.

Thus, the only real issue regards the reasonableness of Petitioner's legal arguments regarding the significance of *Monroe* to the facts of this case. In deciding the appeal, the Court of Appeals never ruled upon the question of whether Petitioner's arguments that *Monroe* did not apply were frivolous [51-A - 62-A]. The Opinion analyzed the central question as this:

> Ducote's attempts to distinguish the case from Monroe are without merit. Monroe was decided by the Georgia Supreme Court, and thus

> controlled the district court's decision [citation omitted]. None of the cases Ducote cites for support came from the Georgia Supreme Court; nearly all are from Georgia's intermediate appellate courts. A number of his citations are to dissenting opinions. Moreover, none of the decisions actually create the exceptions to Monroe that Ducote seeks to invoke. It is clear to us, and should have been to Ducote, that Monroe compelled the dismissal of the amended complaint. The district court did not abuse its discretion in sanctioning Ducote [58-A - 59-A].

No discussion in the Opinion involved the initial argument that Judge Fluornoy's rulings did not meet the *Monroe* threshold, nor was there any discussion of what intermediate court opinions or dissents were cited and why such references were apparently improper. The Court of Appeals appears to adopt a blanket rule that it is *per se* improper to craft a legal argument from intermediate court opinions and dissents.

ARGUMENT

This Court should grant certiorari in this instance under the following Rule 10 (a) and (c) criteria: 1) The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by the District Court so as to call for an exercise of this Court's supervisory power, *i.e.* ordering Petitioner to pay Rule 11

sanctions in the amount of $84, 905.55[2] for advancing reasonable legal arguments, 2) The Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court, *i.e.* what criteria should an appellate court defer to a lower court's imposition of Rule 11 sanctions for advancing legal arguments instead of making an independent assessment of the reasonableness of the arguments, and 3) The Court of Appeals has decided an important question of federal law in a way which conflicts this Court's holding in *Cooter & Gell v. Hartmax Corporation, et al*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), *i.e.* affirming Rule 11 sanctions which were based on the District Court's erroneous view of the law.

1.The Court of Appeals erred in failing to squarely address the question of whether the legal arguments advanced in the trial court by the Petitioner, who was sanctioned $84, 905.55 under Rule 11, F.R.C.P., to distinguish *Monroe v. Sigler*, 353 S.E.2d 23 (Ga. 1987) from the instant case were reasonable or nonfrivolous.

In *Cooter & Gell v. Hartmax Corporation, et al*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), this Court

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2. These sanctions will cause Petitioner, an attorney practicing for 28 years and operating a three attorney firm, personal and professional devastation. His career includes successfully arguing *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), before this Court. He is admitted to the Louisiana Bar, and the Bars of this Court, the 4th, 5th, 9th, and 11th Circuits, and federal district courts in Louisiana, Mississippi, Texas, Colorado, and Ohio.

held that a court imposing Rule 11 sanctions under an erroneous view of the applicable law abuses its discretion. Even the Eleventh Circuit has held that Rule 11 sanctions were not proper in cases where creative, but colorable legal arguments were advanced. *Davis v. Carl*, 906 F.2d 533 (11th Cir. 1990); *Anderson v. Smithfield Foods, Inc.*, 353 F.3d 912 (11th Cir. 2003). *See also Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108 (2nd Cir. 1987); *Hurd v. Ralphs Grocery Co.*, 824 F.2d 806 (9th Cir. 1987); *Mackey v. Pioneer National Bank*, 867 F.2d 520 (9th Cir. 1989); *Dura Systems v. Rothbury Invest.*, Ltd., 886 F.2d 551 (3rd Cir. 1989), *cert. den.*, 493 U.S. 1046 (1990); *Mareno v. Rowe*, 910 F.2d 1043 (2nd Cir. 1990), *cert. den.* 498 U.S. 1028 (1991); *CJC Holdings, Inc. V. Wright & Lato, Inc.*, 989 F.2d 791 (5th Cir. 1993); *Sargent v. Saunders*, 136 F.3d 349 (4th Cir. 1998). By failing to squarely address the reasonableness of Petitioner's legal arguments, the Eleventh Circuit essentially denied Petitioner any meaningful appellate review. A finding that the arguments were "without merit" [58-A] is not the same as a finding that the arguments were frivolous.

This Court should, therefore, clarify the criteria for an appellate court's assessment of the reasonableness of a legal argument. This Court should endorse the use of evolving intermediate court rulings and dissenting opinions. Otherwise, a District Court judge is granted too much power to, as in this case, impose devastating sanctions on an attorney who has simply attempted to reasonably advocate for his client. Neither the public nor the legal system is served well by creating an

atmosphere in which attorneys are afraid to do their job.

2) The Court of Appeals erred by rejecting the Petitioner's legal arguments attempting to distinguish *Monroe v. Sigler* from the instant case solely because the arguments cited Georgia intermediate appellate court decisions and dissenting opinions, none of which "actually create the exceptions to Monroe that [Petitioner] seeks to invoke."

It is axiomatic that much of the law is fluid and evolves over time, often solidifying in one way or another in response to dissenting opinions and legal scholarship. The *Notes of Advisory Committee on 1993 Amendments* to Rule 11, F.R.C.P., address the issue of legal arguments made during the course of litigation:

> Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support *for its theories even in minority opinions*, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph 2 has been violated. Although arguments for a change of law are not required to be specially so

> identified, a contention that is so identified should be viewed with greater tolerance under the rule [emphasis added].

Simply because a legal argument is ultimately rejected by the court, the legal argument is not automatically deemed sanctionable. Rule 11 sanctions are not appropriate simply because counsel aggressively uses distinguishable cases in a effort to "squeeze too much" from them, since Rule 11 does not require counsel to only cite cases directly on point. *Protective Life Ins. Co.v. Dignity Viatical Settlement Partners*, L.P., 171 F.3d 52 (1st Cir. 1999).

It is crucial to examine the various holdings of the Georgia Court of Appeals cited by Petitioner in the District Court and on appeal to understand the scope of *Monroe's* holding and Petitioner's argument that *Monroe* cannot absolutely forbid every malicious prosecution suit when a motion for directed verdict is denied in the underlying criminal trial. These are the cases cited by Petitioner, which the Court of Appeals found to be insignificant.

First, under Georgia law, if a criminal defendant is acquitted, she cannot appeal the denial of the motion for directed verdict. See *Henderson v. State*, 134 Ga.App. 272, 216 S.E.2d 696 (1975); *Grant v. State*, 141 Ga.App. 272, 233 S.E.2d 249 (1977). So the *Monroe* language regarding unappealed denials of directed verdicts (353 S.E.2d 23, 25) is inapplicable when the defendant is acquitted, as happened to Ms. Titelman. Thus, under the strictest interpretation of *Monroe*

as seen below, a criminal court trial judge can forever block a subsequent tort action in even the most outrageous malicious criminal prosecution by denying a clearly meritorious motion for directed verdict of acquittal, because the prompt jury acquittal of the obviously innocent defendant precludes any review of or challenge to the erroneous motion denial. This results in a wholly illogical, unreasonable, and unfair result. As shown below, the development of the caselaw since *Monroe* recognizes this anomaly.

For example, in *Griffin v. Georgia Power Company*, 186 Ga.App. 565, 367 S.E.2d 832 (1988), the first motion for directed verdict was denied in the criminal trial, but a second one was granted. The Georgia Court of Appeals followed *Monroe* and dismissed the subsequent malicious prosecution suit. However, Presiding Judge Banke, joined by Judges Sognier, Benham, and Beasley, wrote a strong dissent, stating that *Monroe:*

> contains language which, stripped of its context, supports the majority holding in this case, I believe the majority's decision extends the holding in *Monroe v. Sigler* well beyond its intended parameters...The majority's holding in the present case not only extends the holding of *Monroe v. Sigler* well beyond its actual facts, it ignores the practical realities that often attend and influence the disposition of initial motions for directed verdicts in criminal cases..." [at 186 Ga.App.567-568].

In *Seven Hills Security Inc., v. Dillingham*, 188 Ga.App. 1, 372 S.E.2d 1 (1988), the same issue once again arose concerning conflicting directed verdict motions, and therein Judges Deen, Banke, Benham, and Beasley dissented from the dismissal of the malicious prosecution suit and urged a more realistic and fair interpretation of *Monroe*, since "*sooner or later a party will avoid civil liability despite having maliciously instigated the prosecution of another.*" [at 188 Ga.App. 3]. Presiding Judge Deen even went on to regret his joining the majority opinion in *Griffin, supra.* [at 188 Ga.App. 2].

Then, in *Atlantic Zayre, Inc. v. Meeks*, 194 Ga.App. 267, 390 S.E.2d 398 (1990), Judges Deen, Banke, and Birdsong, with no dissent, ruled that *Monroe* did not preclude a malicious prosecution suit brought by a juvenile, whose motion for directed verdict of acquittal was denied during his earlier juvenile court delinquency trial, because he was ultimately acquitted. The Georgia Court of Appeals found *Monroe* to be neither controlling nor in significant conflict with their ruling. Obviously, this decision negates any notion that *Monroe* is the impenetrable fortress the trial court holds it to be.

In *Haile v. Pittman*, 194 Ga.App. 105,189, 389 S.E.2d 564, 567-668 (1989), Judges Benham and Beasley dissented from the majority's application of *Monroe* because, as Plaintiff argues in the instant case, the denial of the motion for directed acquittal was not premised on a specific finding that the state had at that time presented sufficient evidence of guilt to convict; as the trial judge expressed some uncertainty about the case.

Then, in *Wolf Camera, Inc. v. Royter*, 253 Ga.App. 254, 558 S.E.2d 797 (2002), the Georgia Court of Appeals ignored the fact that the plaintiff's motion for directed verdict was denied in the prior criminal trial, because in the subsequent malicious prosecution trial, "*there was evidence...which could support the jury's determination that such denial was obtained through fraud committed by the defendants.*" The fraud consisted of the defendants' making false statements to the police and prosecutors, concealing important facts, and in failing to make fair, full, and complete statements affecting the prosecution. This was all done in a conspiratorial effort to have the plaintiff prosecution. *Wolf Camera* essentially vindicates the Ms. Titelman's interpretation of *Monroe* as argued during the course of this case prior to that ruling. That holding also refutes the trial court's finding that, *"On its face alone, this allegation fails to state a claim for malicious prosecution because Plaintiff cannot show that the providing of "incomplete" information to a jury satisfies the elements of malicious prosecution under Georgia law."* [Order granting dismissal of underlying suit, R-3-76, pp.4-5]. The trial court's conclusion that the provision of incomplete evidence to the police and prosecutors cannot form the basis of a malicious prosecution claim was also rejected in *Fleming v. U-Haul of Ga.*, 246 Ga.App. 681, 541 S.E.2d 75 (2000).

In *Kelly v. Serna*, 87 F.3d 1235, 1241 (11th Cir.2002), this Eleventh Circuit Court of Appeals stated in *dicta* that under *Monroe*, even a convicted plaintiff could still recover for malicious prosecution upon a showing of fraud.

Even the Eleventh Circuit Court of Appeals has utilized intermediate Georgia appellate court decisions in its own analysis of Georgia malicious prosecution law. In *Kelly v. Serna, supra*, six such opinions were cited to explain the central issue of proof of lack of probable cause. In *Blackford v. Wal-Mart Stores*, 17 F.3d 367 (11th Cir. 1994), the Eleventh Circuit certified to the Georgia Supreme Court the question of whether proof of actual guilt can defeat a malicious prosecution claim where there was no underlying trial on the criminal charges. There, the Court of Appeals found Georgia law to be "unsettled" with regard to probable cause in a malicious prosecution case, and cited three intermediate court cases. *See also Simmons v. Sonyika*, 394 F.3d 1335 (11th Cir. 2004).

Therefore, it was perfectly appropriate for Petitioner to rely on these various rulings to attempt to keep the malicious prosecution suit viable.

3) Petitioner's legal arguments attempting to distinguish *Monroe v. Sigler* from the instant case were not so unreasonable as to invoke sanctions under Rule 11, F.R.C.P.

As shown here, Petitioner did not violate Rule 11(b)(2), F.R.C.P. His legal arguments were nonfrivolous, and the sanctions should have been deemed an abuse of discretion by the Eleventh Circuit under *Cooter & Gell v. Hartmax Corporation, et al, supra.*

CONCLUSION

Wherefore, Petitioner prays that the Court grant a writ of certiorari to the Eleventh Circuit Court of Appeals, and

thereafter reverse the appellate court's decision. Thereafter, the Court is urged to reverse the District Court's judgment awarding the Rule 11 sanctions, or in the alternative, remand the case to the Eleventh Circuit Court of Appeals with specific instructions to analyze the Petitioner's legal arguments in detail to determine if they were unreasonable or frivolous, including instructions that reliance on dissenting opinions or intermediate Georgia appellate court opinions which "do not actually create exceptions" should nonetheless be considered in assessing the reasonableness of the arguments.

Respectfully submitted,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT - CASE NO. 03-14429

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WENDY JANE TITELMAN,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	NO. 1:01-CV-:
	:	1845-JOF
	:	
ANDREW CHARLES TITELMAN	:	**Filed SEP 17 2002**
CRAIG CHANDLER, JOHN MAYOUE, PAMELA GRAY, DIANE WOODS,	:	
	:	
Defendants.	:	

ORDER

This matter is before the court on Defendants Mayoue and Gray's motion for sanctions pursuant to Rule 11 [58-1]; Defendant Chandler's motion for Rule 11 sanctions [59-1]; Defendant Titelman's motion for sanctions pursuant to Rule 11 [62-1]; Defendant Woods' motion for Rule 11 sanctions [71-1]; and Defendant Woods' motion for leave to file supplemental pleading to motion for Rule 11 sanctions [73-1].

1. Background

On July 13, 2001, Plaintiff, Wendy Jane Titelman, filed a complaint for malicious prosecution against Defendants alleging that from September 4, 2000 through April 27, 2001, Defendants caused the tortious malicious prosecution of Plaintiff in the Superior Court of Cobb County, Georgia for the felony of Interstate Interference with Custody pursuant to O.C.G.A. § 16-5-45, for which Plaintiff was acquitted by the jury on April 27, 2001.

In an order dated August 8, 2002, this court dismissed with prejudice Plaintiff's suit finding that Plaintiff had failed to allege with any particularity the acts by Defendants that supported her complaint of malicious prosecution despite being given an opportunity by the court to reform her complaint. The court also found that Plaintiff failed to allege that the criminal trial judge's denial of her motions for a directed verdict were procured through fraud or corruption.

II Discussion

A. Relevant Facts

Andrew and Wendy Titelman entered into a divorce decree on August 4, 2000. Under the terms of that decree, Andrew Titelman was granted sole physical and legal custody of the couple's two children and Wendy Titelman was granted limited visitation rights. In the facts relevant to the instant proceeding, Wendy Titelman was permitted to have the children from 6:00 p.m., Friday, September 1, 2000 through 6:00 p.m., Monday, September 4, 2000. As of 6:00 p.m. on September 4, 2000, the children had not been returned to Andrew Titelman. On Tuesday, September 5, 2000, Mr. Titelman contacted the Cobb County Police to request their assistance in locating the children. Mr. Titelman filed a criminal complaint with Officer Steve Kirk stating that Mrs. Titelman failed to return the children to his custody as required under the divorce decree. Mr.Titelman also filed an application for a warrant against Mrs. Titelman for interference with custody for the violation of court

ordered visitation on September 5, 2000. Magistrate Judge McLaughlin approved the application the same day. On September 8, 2000, after learning that the Titelman children were in Mississippi, Detective Craig Chandler of the Kennesaw Police Department appeared before Magistrate Judge T.O. Sturdivant and requested a warrant for Mrs. Titelman's arrest for interstate interference with custody. Judge Sturdivant signed the warrant.

As established at the underlying criminal trial, Mrs. Titelman took the children to Mississippi for the weekend. On Saturday, September 2, 2000, Mrs. Titelman had the children evaluated by a forensic psychologist in Mississippi. On Tuesday, September 5, 2000, based on that psychologist's evaluation, Mrs. Titelman went to state court in Mississippi and after an emergency hearing, the Mississippi state court judge entered an ex parte order placing the children in the custody of the Harrison County (Mississippi) Family Court shelter until a hearing could be held and granting Mrs. Titelman visitation to the children while they were in the shelter.

After further proceedings, the children were eventually returned to Georgia. Judge James Bodiford in Georgia ordered that the children be returned to the full custody of Mr. Titelman on September 20, 2000, where they have since remained.

On April 23, 2001, the state's case against Mrs. Titelman proceeded to trial. Mrs. Titelman was charged with interstate interference with custody on Monday, September 4, 2000 in violation of O.C.G.A. § 16-5-45(c)(1). During the jury charge, Judge Robert E. Flournoy, III, the presiding judge of Mrs. Titelman's criminal trial, stated: "A person commits the offense of interstate interference with custody when, without lawful authority to do so, the person knowingly takes any minor person away from the individual who has lawful custody of such minor person and in doing so, removes such minor person from this state." Criminal Transcript, at 876. After the presentation of the state's evidence, Mrs. Titelman moved for a directed verdict. Mrs. Titelman asserted several grounds for her motion: (1) the indictment alleged the wrong section of the criminal

statute, and (2) she was justified in her actions even if she made a mistake of fact. Mrs. Titelman argued that the state had charged Mrs. Titelman under the wrong criminal statute because she had permission to take the children from Georgia. The state argued that the improper "taking" occurred on Monday. September 4, 2000, in Mississippi when Mrs. Titelman failed to return the children to the custody of Mr. Titelman as set forth in the divorce decree. The court denied Mrs. Titelman's motion on both grounds. After Mrs. Titelman presented her evidence, her attorney renewed a motion for a directed verdict on the same grounds as raised before. The court again denied her motion. *Cf. Griffin v Georgia Power Co.*, 186 Ga. App. 565 (1988) (applying *Monroe* and holding that denial of motion for directed verdict after state's evidence was binding determination that probable cause existed and precluded malicious prosecution claim despite fact that judge granted renewed motion for acquittal after defense presented evidence).

The gravamen of Mrs. Titelman's malicious prosecution

complaint in the instant case is that her prosecution was initiated and maintained without probable cause. *See* Amended Cmplt., ¶ 10. As the court explained in its previous order, however, *Monroe v. Sigler*, 256 Ga. 759 (1987), stands for the proposition that the denial of a motion for a directed verdict after the presentation of the state's evidence is a binding determination that probable cause exists and thereby precludes a malicious prosecution claim. *See also Wingster v. Huntley's Jiffy Stores, Inc.*, 200 Ga. App. 252, 252 (1991) (Holding that *Monroe* established a "mandatory inference to be drawn under the circumstances"). Thus, as the court explained to Mrs. Titelman's counsel during the October 18, 2001 hearing, the only question remaining was whether Judge Flournoy's ruling denying Mrs. Titelman's motion for directed verdict was procured through fraud or corruption.

Despite being given the opportunity to amend her complaint, Mrs. Titelman never came forward with any allegation that would support a claim that Judge Flournoy's rulings were a product of fraud

or corruption. The only indication from Mrs. Titelman that this court has of a misstatement or suppression is that when she left the state of Georgia, she was authorized to do so under the divorce decree. As Mrs. Titelman, herself, alleges, however, "[t]his fact was known at all times by these defendants." Amended Cmplt., ¶ 10. In paragraph 11 of her Amended Complaint, Mrs. Titelman also discusses her justification defense. Thus, the only other fact that she alleges could have been known and suppressed by Defendants was whether she was acting with or without an arguable justification. Notably, however, both of these facts were known by Judge Flournoy at the time he denied Mrs. Titelman's motion for directed verdict, and therefore his ruling could not have been procured by fraud or corruption. Mrs. Titelman's counsel argued to Judge Flournoy that the indictment was flawed because Mrs. Titelman was authorized to leave the state of Georgia with the children. Her criminal counsel also spent considerable time during opening argument and in cross-examining the state's witnesses on laying the foundation for her

justification defense. Accordingly, no material fact was suppressed or misstated to Judge Flournoy that would lead this court to understand that his denial of Mrs. Titelman's motion for a directed verdict was the product of fraud or corruption.

A review of the allegations made against each Defendant does not counsel a different result. In her Amended Complaint, Mrs. Titelman also asserted:

In addition to the facts set forth above, all defendants directly and jointly aided, counseled, and abetted the malicious prosecution of Plaintiff by intentionally:

A. Failing to disclose all material facts to the District Attorney (refers to entire District Attorney's Office) and/or the police or Grand Jury.
B. Providing knowingly false material information to the police and/or the District Attorney.
C. Defendants Woods and Titelman provided knowingly false and/or incomplete material information to the criminal court jury and encouraging other witnesses to do so.
D. Pressuring the District Attorney to prosecute the Plaintiff.
E. Continuing to participate and assist in the criminal prosecution after Plaintiff rejected the District Attorney's plea offer, knowing that conviction was

impossible and probable cause never existed.

F. Assisting the District Attorney in strategy and trial preparation.

G. Intentionally providing knowingly false material information to the FBI and the U.S. Attorney to procure the arrest of Plaintiff for a federal felony of Unauthorized Flight to Avoid Prosecution.

H. Providing knowingly false or incomplete material information to other witnesses in the criminal trial to obtain the testimony of those witnesses against Plaintiff.

I. Encouraging the District Attorney to attempt to pressure Plaintiff's witnesses to abandon Plaintiff's criminal defense.

J. Procuring the concealment from Plaintiff [of] material evidence proving the sexual abuse of the children and the gross negligence of Woods and King.

K. Other acts to be ascertained in discovery.

Amended Complaint, ¶ 15. In subpart A, Mrs. Titelman alleges that not all material facts were presented to the district attorney, police, or grand jury. But this is irrelevant to the determination of whether Judge Flournoy's ruling was procured through fraud or corruption. Furthermore, other than the two facts noted above, Mrs. Titelman has not asserted any other fact that is alleged to be material that was suppressed by Defendants or that was misrepresented to the Judge

who made the decision to deny Mrs. Titelman's motion for a directed verdict. Similarly, with reference to subpart B, Mrs. Titelman has not alleged any fact that if it had been presented to the district attorney, police, or grand jury, would have misled Judge Flournoy. Although Mrs. Titelman alleges with no specificity that Defendants Woods and Titelman provided incomplete information to the criminal jury, Mrs. Titelman undertook a significant effort to rebut the state's case and presented several witnesses, including the forensic psychologist who evaluated the children in Mississippi, in support of her contentions against Mr. Titelman and her defense of justification. Despite her presentation of this evidence, Judge Flounoy again denied her renewed motion for directed verdict. At the time he made that ruling, the Judge had before him all of the information in the possession of the parties. Mrs. Titelman's allegation that Defendants Woods and Titelman "encouraged" other witnesses to provide "incomplete information" does not show that other witnesses did so, nor does it show that Judge Flournoy's

rulings were procured by fraud. Similarly, an accusation that Defendants "pressured" the District Attorney into bringing charges or "continued" to participate in the prosecution by "assisting" the District Attorney, does not have any effect on the rulings of Judge Flournoy. *See* Amended Cmplt., ¶¶ 15D, E and F. As the court explained in its previous order, the involvement of the FBI or the U.S. Attorney's Office is immaterial to the instant malicious prosecution suit based on a state court criminal trial. *See id.*, ¶ 15G. Mrs. Titelman's remaining allegations, again, would not have any effect on the decision of Judge Flournoy to deny her motions for a directed verdict. *See id.*, ¶¶ 15H-K.

Mrs. Titelman filed suit against Andrew Charles Titelman, her ex-husband; Craig Chandler, a detective with the Kennesaw Police Department; John Mayoue and Pamela Gray, attorneys for Andrew Charles Titelman; and Diane Woods, a guardian ad litem appointed to represent the Titelman children during the divorce proceedings between the Titlemans. Yet Mrs. Titelman's complaint

is devoid of any allegation of any specific act taken by her ex-husband, the lawyers, and a police officer that could possibly have affected Judge Flournoy's decision given the complete factual record and full presentation he had of Mrs. Titelman's defense.

Judge Flournoy's ruling on probable cause was conclusively established. The only basis upon which Mrs. Titelman's suit could proceed, as the court explained to her counsel, was by showing that Judge Flournoy's ruling was procured through fraud or corruption. There is no allegation that any plotting or scheming done by Defendants had anything to do with the decision of the Judge. The court recognizes that Mrs. Titelman raised arguments with respect to the charging decision of the District Attorney's Office. As evidenced by the criminal trial transcript, however, Judge Flournoy was fully aware of the parties' competing contentions on this issue and accepted the state's argument that the taking could be accomplished by not returning to Georgia. The court has no occasion to substitute its judgment for that of a state court trial judge. In sum, Plaintiff

failed to allege with any particularity the acts by Defendants that support her complaint of malicious prosecution despite being given an opportunity by the court to reform her complaint. Plaintiff also failed to allege that Judge Flournoy's denials of her motions for a directed verdict were procured through fraud or corruption.

B. Rule 11

The Eleventh Circuit has identified three types of conduct by an attorney or party that warrant the imposition of Rule 11 sanctions. First, sanctions are warranted where a party or attorney files a pleading or other paper that has no reasonable factual basis. Second, sanctions are warranted where a party or attorney advances a legal theory that has no reasonable chance of success under the decisional or statutory law and that cannot be advanced as a reasonable argument to reverse, modify, or extend the law. Finally, sanctions are warranted where a party or attorney files a motion or pleading for purposes of harassment or delay. *See United States v. Milam*, 855 F.2d 739, 742 (11th Cir. 1988); *accord Baker v. Alderman*, 158 F.3d

516, 524 (11th Cir. 1998).

Defendants Mayoue and Gray notified Plaintiff by letter on September 5, 2001, of their intention to pursue Rule 11 sanctions; Defendant Chandler notified Plaintiff on December 27, 2001; Defendant Titelman on September 27, 2001, and Defendant Woods on November 11, 2001. Defendants Chandler and Woods are the only Defendants who proffered information on the actual amount of attorney's fees they have expended in the litigation. Defendant Chandler testified that his fees and expenses totaled nearly $19,937.87. Defendant Woods testified her fees were $11,531.25. The other Defendants intend to supplement the record with their demand for attorney's fees.

Defendants here argue that Plaintiff's conduct in the instant litigation warrants sanctions under all three circumstances addressed in Rule 11. Specifically, Defendants contend that Plaintiff pursued litigation in federal court in order to harass Defendants and to relitigate the issues in her divorce and custody proceedings.

Defendants also assert that the Georgia law governing the effect of a judge's denial of a motion for a directed verdict, set forth in *Monroe v. Sigler*, 256 Ga. 759 (1987), is clear and Plaintiff did not have a reasonable argument to modify that law. Finally, Defendants assert that Plaintiff had no facts to support her complaint. Plaintiff's sole response to these arguments is her contention that *Monroe* is not controlling and a subsequent opinion by the Georgia Court of Appeals is a sufficient, non-frivolous argument to distinguish *Monroe*.

Rule 11 incorporates an objective standard of "reasonableness under the circumstances." *Donaldson*, 819 F.2d at 1556. The court's inquiry focuses only on the merits of the objectionable paper "gleaned from facts and law known or available to the attorney at the time of filing." *Jones v International Riding Helmets, Inc.*, 49 F.3d 692, 694-95 (11th Cir. 1995) (emphasis in original). In this circuit, courts considering Rule 11 sanctions must engage in a two-step inquiry: (1) whether the party's claims are

objectively frivolous; and (2) if so, whether the person who signed the objectionable papers should have been aware that the claims were frivolous. *See. E.g., Baker*, 158 F.3d at 524; *Jones*, 49 F.3d at 695. In determining the reasonableness of a paper's legal basis, "a court may consider the time available to prepare the pleading; the complexity of the legal issues; the plausibility of the argument; and whether the party is proceeding pro se." *Pelletier v. Zweifel*, 921 F.2d 1465, 1514 n.88 (11th Cir. 1991).

C. Analysis

1. Legal and Factual Sufficiency of Plaintiff's Complaint

At an October 18, 2001 discovery conference, the court specifically reminded Plaintiff of her obligations under Rule 11 and repeatedly warned Plaintiff of the risks attendant to pursuing this litigation. See Transcript of October 18, 2001, Hearing, at unnumbered pages 4-5 ("I am satisfied [further pleadings] will be reviewed carefully for Rule 11 violations. And I'm not absolving

you of any that may have happened in the past, but I am pointing out to you that Rule 11 exists and you need to be very careful about what you allege. It's a whole lot easier for me to let you amend the case if you got good grounds than it is for me to protect you from paying fees of your opponent if you didn't have good grounds."); at 13 ("I don't want to be heavy handed with the Plaintiff, but let me tell you that the last one of these spite malice contests I had in federal court that came out of a child custody case ended up costing the plaintiff and his counsel either 40 or $70,0000 before it was all over with. . . . I want you to realize that you may be spending your own money with your zeal. So you may want to be real careful here."); at 25 (if Plaintiff's counsel maintains there was no probable cause in the case "in the face of what seems to be the Georgia law, that if it went to a jury over a motion for a directed verdict, he may have Rule 11 problems"; if Plaintiff's counsel can allege a theory that there was no probable cause, he would not face Rule 11 sanctions later, "if he does it wrong, it could get expensive.") at 28 ("But if it turns out you

allege it and you had no reasonable basis on which to allege it, and they move for Rule 11 sanctions, and they do what they do to - with the safe harbor provision, then I'll impose sanctions. That's what I'm trying to get you to understand."); at 33 ("I am faced, to be honest with you, with a complaint that reads like a press release and a gragment of a transcript that reads like there is no case at all here. And so I want to make sure that plaintiffs have got their guns loaded and I want to make sure they are taking this seriously. . . . I'm being very candid with what I'm doing here as a manager of this case. If you want to protect yourself on Rule 11 sanctions, read the law.").

Despite these clear admonitions, Plaintiff filed an amended complaint that the court determined in its August 8, 2002 order, was wholly insufficient to cure the deficiencies in the first complaint. As the court noted in its order, Plaintiff's initial complaint failed to make specific claims against the named Defendants and failed to allege that Judge Flournoy's order was procured through fraud or corruption. The court granted Plaintiff additional time to amend her

complaint and address these deficiencies. In her amended complaint, Plaintiff added an allegation that Defendant Chandler falsely testified before a Cobb County Grand Jury in December 2000 and that Defendants Woods and Titelman "provided knowingly false and/or incomplete material information to the criminal jury." As the court noted in its order, however, on its face, Plaintiff cannot show that the provision of "incomplete" information satisfies the elements of malicious prosecution in Georgia. Plaintiff also added a summary of allegations that "all defendants directly and jointly" aided in the malicious prosecution. Finally, despite the specific instruction of the court that Plaintiff should allege facts that would show that Judge Flournoy's order was tainted by fraud and corruption, Plaintiff failed altogether to amend her complaint to address this deficiency. As the court had explained in its August 8 order, the summary of allegations did not cure Plaintiff's complaint of its "shotgun" nature or its deficiencies with respect to Judge Flournoy's ruling. The court finds it relevant that at the time Plaintiff was granted leave to amend her

complaint, Plaintiff had already taken the depositions of Cobb County District Attorney Patrick H. Head, prosecuting attorney Francie Hakes and Rose Wing of the District Attorney's Office in the instant litigation. Plaintiff also had access to the entirety of the testimony in her criminal trial. Despite the availability of this information, Plaintiff failed to allege in her amended complaint facts against each Defendant with any particularity and failed to allege that Judge Flournoy's ruling was procured through fraud or corruption. As the court explained above, even when considering Plaintiff's general allegations, none would affect whether Judge Flournoy's ruling was the product of fraud or corruption. When a plaintiff fails to respond to a court's order for a more particular pleading, "the court should strike his pleading, or, depending on the circumstances, dismiss the case and consider the imposition of monetary sanction." *Byrne v Nezhat*, 261 F.3d 1075, 1129-34 (11th Cir.2001) (discussing

the problems occasioned by shotgun pleadings).[1]

Any lawyer facing prosecution of this suit would have run into the undistinguishable precedent of *Monroe* which holds that the denial of a directed verdict after the presentation of the state's evidence - in the absence of fraud or corruption - conclusively establishes probable cause for the purposes of a malicious prosecution suit. Plaintiff's lawyer had no choice but to show that Judge Flournoy's decision was procured by fraud. On the basis of the criminal trial record available to all parties, every fact now alleged to be critical was known by Judge Flournoy when he made his decision. Further, it is apparent to this court that Plaintiff's counsel cannot articulate how any individual Defendant procured by deceit or fraud Judge Flournoy's rulings. There is simply no nexus

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1. Although the court is not convinced that Plaintiff forwarded a reasonable argument to distinguish the "mandatory inference" required by Monroe, the court finds the lack of factual support for Plaintiff's allegations, as well as it determination that Plaintiff pursued this litigation for the purpose of harassment to be sufficient bases on which to impose sanctions.

between the alleged actions of Defendants and the ruling made by the Judge. Under *Byrne* and Rule 11, therefore, the court finds that monetary sanctions are appropriate.

2. Harassment

Additionally, in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), the Eleventh Circuit instructed district courts when considering whether a claim was filed and prosecuted in bad faith "to examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim." *Id.* At 1515. In making this assessment, the *Pelletier* court considered the "shotgun" nature of the plaintiffs' pleadings which were "replete with factual allegations that could not possibly be material to any of the causes of actions they assert." *Id.* At 1517-18. The court also found that plaintiffs' counsel had prosecuted the case in bad faith because he knew at the outset that plaintiffs' claims were meritless. *Id.* At 1520. Finally, the court determined that monetary sanctions were warranted. *Id.* At 1521.

With these guidelines in mind, the court has considered the information presented by the parties at the October 18 discovery conference as well as all pleadings filed in this case and finds that Plaintiff abused the litigation process by using the instant federal suit as an attempt to relitigate the issues involved in the underlying divorce and custody proceedings. Plaintiff continued to take this tactic despite specific and clear warnings from the court that this strategy was not relevant to Plaintiff's cause of action for malicious prosecution and would not be tolerated. For example, in its first order issued in this litigation, the court directed that certain statements be stricken from Plaintiff's complaint. Specifically, the court instructed Plaintiff that the letter written by some members of the jury that deliberated in her criminal trial would not be considered by this court because the jury had not made any findings with respect to maliciousness while they were empaneled as a jury. Despite this ruling and discussion of this issue at the discovery conference, Plaintiff repeated and referred to the contents of the jury letter in her

response to Defendants ' motions to dismiss. Moreover, Plaintiff's argument that such a letter rendered the denial of her motion for a directed verdict by Judge Flournoy to be "invalid" is without any basis in the law.

Similarly, the court reminded Plaintiff that her defense in the criminal prosecution - that she took the children to Mississippi to protect them from their father - was not an issue in the malicious prosecution suit. *See* Hearing Transcript, at 37 (advising Plaintiff's counsel that allegations of sexual abuse were not to be raised). Despite these clear admonitions, Plaintiff again raised these issues in her response to Defendants' motions to dismiss and motions for sanctions. Plaintiff alleged that Mr. Titelman did sexually abuse the children and his testimony in the criminal trial to the contrary was fraudulent and deceitful. Plaintiff argues that had Mr. Titelman admitted his guilt during her criminal prosecution, Judge Flournoy "would have directed a verdict of acquittal in a heartbeat and would have ordered Mr. Titelman's arrest." *See* Supplemental Motion, at 4. Furthermore, in her response to

Defendants' motions for sanctions, Plaintiff contends that "it is well documented that child molesters routinely pass polygraphs." *See* Response, at 1-2 n.1. As explained in its previous order, these allegations do not show that Judge Flournoy's ruling was procured through fraud or corruption and are irrelevant to Plaintiff's claim of malicious prosecution. When he ruled on Plaintiff's motions for directed verdict, Judge Flournoy had before him Mrs. Titelman's contention that she took the children to Mississippi to protect them from their father and Mr. Titelman's testimony to the contrary. Thus, no fraud was perpetrated against Judge Flournoy with respect to the allegations of sexual abuse. Furthermore, as the court explained above, none of Plaintiff's allegations in her amended complaint was relevant to the central issue of whether Judge Flournoy's ruling was procured through fraud or corruption.

Finally, in analyzing the circumstantial evidence available to the court, it is evident from statements made by Plaintiff's counsel that the federal suit was not undertaken for legitimate purposes, but rather was an attempt to elicit further discovery for use in Plaintiff's underlying divorce

and custody proceedings and as a sidelight to Plaintiff's and Plaintiff's counsel's personal crusade against Defendants in this litigation. On April 29, 2002, Plaintiff's counsel wrote an open letter to the Members of the Cobb County Bar and the Metro Atlanta Mental Health Professionals in which he recounts Plaintiff's disagreements with the manner in which the state courts and Defendant Woods acted during the divorce and custody proceedings. Plaintiff then forwarded her counsel's letter and a personal recollection to numerous people. In her personal statement, Plaintiff asserts that "we are[] taking it to the peers of those who are guilty, and we are charging these people to hold Diane Woods and Elizabeth King accountable. *We will continue to fight in both state and federal court.*" *See* Supplemental Pleading of Diane Woods, Exh. 6 (emphasis added).[2] Furthermore, Defendants aver, and Plaintiff does not deny, that Plaintiff has already attempted to insert the limited discovery that took place in the instant litigation into her ongoing divorce and custody proceedings. As

2. The court GRANTS Defendant Woods' motion for leave to file supplemental pleading to motion for Rule 11 sanctions [73-1].

the court painstakingly explained to Plaintiff in the October 18 discovery conference, federal court is not the forum to relitigate her complaints from the underlying divorce and custody proceedings. The court explained to Plaintiff the elements of malicious prosecution in Georgia and the deficiencies Plaintiff would need to cure in order to survive Defendants' motions to dismiss. Plaintiff chose not to cure those deficiencies.

Plaintiff and her counsel may desire to engage in a public relations campaign to discredit her divorce and custody proceedings, but federal court is not the appropriate forum for that campaign. Based on the facts and circumstances available to the court, it is clear that Plaintiff and her counsel did not initiate the instant litigation in an attempt properly to pursue a malicious prosecution claim. Rather, Plaintiff and her counsel saw a suit in federal court simply as another forum for their public relations campaign. Rule 11 sanctions may be imposed for "the purpose of deterrence, compensation, and punishment." *Aetna Ins. Co. v. Meeker*, 953 F.2d 1328, 1334 (11th Cir. 1992). The court determines

that monetary sanctions are appropriate in this case. The court believes that sanctions will deter such behavior in the future while not chilling an attorney's appropriate zeal in pursuing novel legal theories.

As such, the court GRANTS Defendants' motions for Rule 11 sanctions against Plaintiff's counsel.[3] Defendants Titelman, Chandler, Mayoue, Gray, and Woods are DIRECTED to file a petition for attorney's fees within fifteen (15) days from the filing date of this order. In considering attorney's fees, the court is guided by the instructions of *Norman v. Housing Authority*, 836 F.2d 1292 (11th Cir. 1988), and *ACLU v. Barnes*, 168 F.3d 423 (11th Cir. 1999), and expects Defendants' fee petitions to be filed in conformance with those cases. After Defendants have submitted their fee petitions, Plaintiff's counsel has fifteen (15)

3.The court would be authorized to impose sanctions on both Plaintiff and her counsel if information before the court showed specifically that Plaintiff, herself, violated Rule 11. See Baker v. Alderman, 158 F.3d 516, 526 (11th Cir. 1998). Although the court has available Plaintiff's e-mail forwarding the letter of Plaintiff's counsel, Plaintiff's counsel's is the only signature on her complaint, and Plaintiff did not attend the October 18, 2001, discovery conference where the court set for the basis for much of its instant order. As such, the court imposes monetary sanctions on Plaintiff's counsel only.

days to pay the attorney's fees to Defendants or file objections with the court.

II Conclusions

The court GRANTS Defendants Mayoue and Gray's motion for sanctions pursuant to Rule 11 [58-1]; GRANTS Defendant Chandler's motion for Rule 11 sanctions [59-1]; GRANTS Defendant Titelman's motion for sanctions pursuant to Rule 11 [62-1]; GRANTS Defendant Woods' motion for Rule 11 sanctions [71-1]; and GRANTS Defendant Woods' motion for leave to file supplemental pleading to motion for Rule 11 sanctions [73-1].

SO ORDERED this 16th day of September 2002

J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WENDY JANE TITELMAN,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	NO. 1:01-CV-1845-JOF
	:	
ANDREW CHARLES TITELMAN	:	**Filed JUL 29 2003**
CRAIG CHANDLER, JOHN MAYOUE,	:	
PAMELA GRAY, DIANE WOODS,	:	
	:	
Defendants.	:	

ORDER

This matter is before the court on motion for clarification [89-2]; Defendant Woods' motion for attorney's fees [90-1]; Defendants Mayoue and Gray's motion for attorney's fees [91-1]; Defendant Titelman's motion for attorney's fees [92-1]; Defendant Chandler's motion for attorney's fees [93-1]; motion for hearing [99-1]; and Defendant Chandler's motion for leave to file sur-reply [100-1].

I. Procedural History

The facts and circumstances surrounding this case are set forth

in detail in the court's prior orders of November 8, 2001, August 8, 2002, and September 17, 2002. In its last order, the court granted Defendants' motions for sanctions against Plaintiff's counsel pursuant to Rule 11. The court directed Defendants to file petitions for attorney's fees in accordance with the dictates of *Norman v. Housing Authority*, 836 F.2d 1292 (11th Cir. 1988), and *ACLU v. Barnes*, 168 F.3d 423 (11th Cir. 1999). Defendants each filed the required fee petitions, and Plaintiff did not respond, indicating no opposition. *See* LR 7.1B, N.D. Ga. Subsequently, Plaintiff's local counsel, Michael Hirsh, filed a motion for clarification or modification arguing that he should not be liable for any portion of the Rule 11 sanctions imposed by the court. Defendants Gray, Mayoue, Woods, and Chandler opposed Mr. Hirsh's motion. The court held a hearing on April 23, 2003, to consider Mr. Hirsh's arguments.[1]

II. Discussion

A. Motion for Clarification or Modification

Richard Ducote, an attorney in Louisiana, contacted Michael

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1. The court GRANTS Mr. Hirsh's motion for hearing [99-1].

Hirsh, an attorney in Georgia, to act as local counsel in Plaintiff's lawsuit. Mr. Hirsh signed Plaintiff's initial complaint and signed Mr. Ducote's *pro hac* vice application. Mr. Hirsh attended a conference held on October 16, 2001, representing Plaintiff, and Mr. Ducote participated in that conference by telephone. During the conference, the court put both of Plaintiff's counsel on notice as to the court's concerns about Plaintiff's complaint and the potential for sanctions pursuant to Rule 11 up to and including an award of attorney's fees expended by all Defendants. The court gave Plaintiff the opportunity to file an amended complaint to cure the defects pointed out by the court. Plaintiff did file an amended complaint which the court determined was inadequate as a matter of law. Mr. Ducote actually signed the amended complaint and while Mr. Hirsh did not put a signature on the document, he and his firm are listed on the amended complaint as local counsel for Plaintiff. Mr. Hirsh never withdrew as counsel and remained on the certificate of service for all pleadings entered in the case. Mr. Hirsh did file a change of address notification.

Mr. Hirsh contends that he should not be subject to the Rule 11 sanctions imposed by the court because he did not sign the amended complaint and therefore has taken no action which would trigger Rule 11. He states that Rule 11 provides that if a pleading is not signed, the court should strike it. Mr. Hirsh further contends that he was acting *pro bono* in his capacity as local counsel and did not expect any compensation for his efforts. He argues that he did not act in "bad faith," and therefore the court cannot impose sanctions against him pursuant to Rule 11. Mr. Ducote also provided an affidavit testifying that Mr. Hirsh took "no part in drafting the Amended Complaint, signing the Amended Complaint, filing the Amended Complaint, or in any subsequent advocacy of anything in the Amended Complaint." Affidavit of Richard Ducote, November 21, 2002. Mr. Ducote further averred that he was "fully and solely responsible for the content of the pleadings and the strategy employed by Plaintiff." *Id.*

Defendants contends that Mr. Hirsh acted as local counsel throughout the litigation and did not disavow Plaintiff's amended

complaint with his name and bar number even if he did not actually affix his signature to the document. Defendants argue that Mr. Hirsh's continued representation of Plaintiff, including filing a change of address notification in this case constitute the "later advocacy" that triggers Rule 11. Defendants further contend that as local counsel, Mr. Hirsh is responsible for the conduct of Mr. Ducote acting *pro hac vice* upon the application proffered by Mr. Hirsh.[2]

The court does not doubt the sincerity of Mr. Hirsh's belief that he did not engage in this litigation in bad faith. However, there is no "bad faith" requirement to trigger the imposition of Rule 11 sanctions. *See Hashemi v. Campaigner Publications, Inc.*, 784 F.2d 1581, 1583 (11th Cir. 1986) (noting that 1983 amendment to Rule 11 abrogated the bad faith standard in favor of more stringent objective standard). The court also has no reason to doubt the testimony of Mr. Ducote that he, and not Mr. Hirsh, drafted the amended complaint. Mr. Hirsh, however, need not

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2. The court GRANTS Defendant Chandler's motion for leave to file sur-reply [100-1].

actually have signed the amended complaint in order for Rule 11 to be implicated. In *Turner v. Sunguard Business Systems, Inc.*, 91 F.3d 1418 (11th Cir. 1996), the court considered the imposition of Rule 11 sanctions against counsel who had substituted for the plaintiff's original counsel in an employment discrimination case. The substitute counsel had argues that because he did not sign the plaintiff's original complaint, he had taken no action that triggered Rule 11. *Id* at 1421. The court held, however, that counsel's argument "ignore[d] the plain language of Rule 11, which merely requires 'papers' to be 'present[ed]' to the court." *Id.* Further, the court noted that Rule 11 applies to all papers filed in a suit. *Id.* The court found that because counsel had filed a notice of appearance in the case, he was "later advocating" that the "factual contentions [in the complaint] ha[d] evidentiary support." *Id.* (noting that by filing a notice of appearance, counsel had essentially refiled the plaintiff's complaint). Here, Mr. Hirsh filed a change of address notification with the court. As the notice of appearance in *Turner*, the court finds this is sufficient "later

advocacy" to trigger Rule 11 sanctions.[3]

Mr. Hirsh cannot claim that he was unaware of the litigation tactics employed by Mr. Ducote because Mr. Hirsh is on the certificate of service for every pleading filed in the case. He received Defendants' Rule 11 "safe harbor" letters and the orders of this court. Yet, Mr. Hirsh did not give any indication that he did not support Plaintiff's strategic decisions. Most notably, Mr. Hirsh did not withdraw as counsel.

Furthermore, the court cannot ignore the duties Mr. Hirsh took on when he agreed to act as local counsel for Mr. Ducote. Mr. Hirsh signed Mr. Ducote's *pro hac vice* application without which Mr. Ducote would not have had access to this court. Under this court's local rules, Mr. Hirsh, as local counsel, is also required to sign every pleading that

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3. For the reasons stated in *Turner*, the court finds that *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987) and *Harris v. Marsh*, 1988 U.S. Dist. LEXIS 13071 (E.D.N.C. Sept. 30, 1988), cited by Mr. Hirsh in his "supplemental authority" brief, are inapposite. Here, the court determined that Mr. Hirsh "later advocated" Plaintiff's amended complaint when he filed a notice of change of address. In *Robinson and Harris*, the court considered only whether the attorney placed his actual signature on a pleading.

is filed with the court by a *pro hac vice* attorney; a duty Mr. Hirsh's "no signature" defense ignores. *See* LR 83.1B(2). Under these circumstances, the court finds it has no choice but to include Mr. Hirsh in its order granting Rule 11 sanctions. To do otherwise would be to ignore the responsibilities and duties incumbent on local counsel. *See, e.g., Sanders v. Russell*, 401 F.2d 241, 248 (5th Cir. 1968) (use of local counsel "satisfies the reasonable interest of the District Court in having a member of its Bar, who is subject to the court's general control, be professionally responsible for the litigation and who can be served with papers, can be notified of hearings and can be held accountable if anything reflecting on the Court of an abuse of its process occurs during the course of the litigation."). The court DENIES Mr. Hirsh's motion for clarification [89-1] or modification [89-2].

B. Attorney's Fees

In order to analyze an application for attorney's fees, the court must first "multiply hours reasonably expended by a reasonable hourly rate." *Norman v. Housing Auth.*, 832 F.2d 1292, 1299 (11th Cir. 1988).

"A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Id.* "Satisfactory evidence at a minimum is more than the affidavit of the attorney performing the work." *Id.* If a party provides only an affidavit from the attorney who performed the work, the court must apply "its own knowledge and expertise concerning reasonable and proper fees." *Id.* At 1303. The court must next look at whether the hours charged are reasonable, excluding "excessive, redundant or otherwise unnecessary" hours. *Id.* At 1301 (citation and quotation omitted). The "fee applicant bears the burden of establishing entitlement and documenting the appropriate hours and hourly rates." *ACLU v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999). That burden includes "supplying the court with specific and detailed evidence from which the court can determine the reasonable hourly rate." *Id.* (citing *Norman*, 836 F.2d at 1303).

1. Defendant Titelman

Defendant Titelman seeks total attorney's fees in the amount of

$30,769.74 for work done by Thomas E. Cauthorn III and John E. Hall, Jr. Mr. Cauthorn testified that his billing rate is $250 per hour and he billed Defendant Titelman $10,946.25. Mr. Cauthorn testified that he also billed $533.38 in costs that were not awarded in the bill of costs. Mr. Cauthorn did not testify as to the billing rates of any other individuals affiliated with his law firm and did not provide the affidavit of any attorney indicating that his billing rate is reasonable for attorneys of his experience in this area of the law. Furthermore, although Mr. Cauthorn provided the invoices sent to his client, he did not provide a total number of hours he worked on this matter to the court. The billing invoices submitted to the court list a variety of individuals who worked on this matter. As such, the court cannot ascertain which of the items listed on the invoices are actually being charged in his fee petition. Furthermore, although Mr. Cauthorn has limited his expenses request to those expenses not covered in the bill of costs, he has not indicated to the court what expenses are sought in the $533.38 request. Thus, the court awards only $5,000 in attorney's fees requested by Mr. Cauthorn on

behalf of Defendant Titelman and awards no costs.

Defendant Titelman also provided the affidavit of attorney John E. Hall, Jr., of Hall, Booth, Smith & Slover, P.C., to support his request for attorney's fees of $19,104.50. Mr. Hall testified that his billing rate is $130 per hour. He further testified that the billing rates of attorneys Jack Gresh and Abdi Ammari were $110 per hour; paralegals Robin Correll, Marti Hendrix, and Mr. Gresh (prior to his becoming an attorney licensed in the state of Georgia) billed at $85 per hour. Mr. Hall billed 53.3 hours; Mr. Gresh, 33.8, and Ms. Ammari, 14.7. Ms. Correll billed 15.7, Ms. Hendrix, 1.6, and Mr. Gresh, 77.0. Mr. Hall also stated that his firm had expended $185.61 in costs not awarded in the bill of costs.

Mr. Hall did not provide the affidavit of any attorney indicating that their billing rates are reasonable for attorneys of their experience in this area of the law. In its judgment, the court finds that an hourly rate of $130 for a partner, $110 for an associate, and $85 for a paralegal is reasonable. In exercising its billing judgment, the court disallows the following fees: Robin Correll - September 20, 2001 (0.2), September 25,

2001 (0.8), September 26, 2001 (0.3), and October 12, 2001 (0.3); Jack Gresh - October 2, 2001 (1.0), October 3, 2001 (11.0), October 22, 2001 (2.4), October 23, 2001 (0.2), October 24, 2001 (2.5), December 27, 2001 (1.0), and July 31, 2002 (1.0). These generally cover telephone conferences with co-counsel, duplicative efforts, and research relating to *pro hac vice* status of Plaintiff's counsel, which the court does not find integral to the legal defense of Defendant Titelman. Although Mr. Hall has limited his expenses request to those expenses not covered in the bill of costs, he has not indicated to the court what expenses are sought in the $185.61 request. Thus, the court does not award any costs. In sum, the court disallows $1809.50 in attorney's fees on Mr. Hall's affidavit and allows $17,295.00. The total fees awarded for Defendant Titelman's defense is $22,295.00.

2. Defendant Chandler

J. Anderson Davis testified that he bills at a rate of $125 per hour; his associate, Kristy Cordle, bills at $110 per hour; and their paralegal, Becca Coble, at $65 per hour. The attorneys billed 110 hours

in Defendant Chandler's defense and Ms. Coble billed 39 hours. The total legal fees requested are $27,412.00 and expenses are $6,528.80, for a total of $33,940.80. Defendant Chandler provided the affidavit of attorney Ronald R. Womack of The Womack Law Firm to affirm that the rates billed by Defendant Chandler's attorneys are reasonable. Defendant Chandler also submitted the billing invoices to support his fee petition.

Defendant Chandler seeks $6,528.80 in costs. A review of the documents indicates these costs encompass such items as photocopying, mailing, and computer research. The court notes, however, that costs in the amount of $5,813.46 were awarded in favor Defendant Chandler on September 3, 2002. Defendant Chandler does not show to the court whether any of the costs he seeks in his Rule 11 motion were already awarded in his bill of costs. Thus, the court declines to award any costs to Defendant Chandler.

In exercising its billing judgment, the court disallows the following fees from Ms. Coble: August 29, 2001 (0.9), April 23, 2002

(0.4), April 29, 2002 (1.0), Mary 29, 2002 (0.6), July 10, 2002 (0.7), and July 12, 2002 (0.9); from Ms. Cordle: September 19, 2001 (0.5), September 20, 2001 (0.5), September 21, 2001 (2.0), and February 15, 2002 (0.4); from Mr. Davis: November 21, 2001 (0.7), January 11, 2002 (0.3), June 13, 2002 (0.5), July 10, 2002 (0.3), September 13, 2002 (0.8), September 17, 2002 (0.3), and September 18, 2002 (0.4). These generally cover categories of case status preparation and litigation plans, notification to insurers, and appellate work which the court finds are not relevant to the legal defense of Defendant Chandler. In sum, the court disallows $1079 and allows $26,333.

3. Defendant Woods

Defendant Woods seeks $15,637.50 in attorney's fees. Woods' attorney Jerry Gentry testified that his regular billing rate is $225 per hour, but as a professional courtesy to Defendant Woods he was billing at $125 per hour. Mr. Gentry provided the affidavit of Theodore Freeman to certify that $125 was a reasonable hourly rate for his services. Mr. Gentry also testified that he expended 125.10 hours in

representing Defendant Woods. Mr. Gentry attached the actual billing records of his services to Defendant Woods as well as a summary of those services in support of his petition for attorney's fees. The court has reviewed the billing invoices provided by Mr. Gentry and determines that all charges are supported in the record. Accordingly, the court awards Defendant Woods' attorney's fees of $15,637.50.

4. Defendants Mayoue and Gray

James T. McDonald, Jr. and Robert S. Huestis provided legal services on behalf of Defendants Mayoue and Gray. Mr. McDonald expended a total of 53.50 hours at a rate of $175 per hour for a total of $9,362.50. Mr. Huestis expended 120 hours at an hourly rate of $110 for a total of $13,200. In the fee petition, Messrs. McDonald and Huestis provided billing invoices and a summary of the legal work conducted for Defendants Mayoue and Gray. They did not, however, provide the affidavit of any attorney indicating that their billing rates are reasonable for attorneys of their experience in this area of the law.

In its judgment, the court finds that an hourly rate of $175 for a

partner and $110 for an associate is reasonable. In exercising its billing judgment, the court disallows the following fees from Mr. McDonald. August 3, 2001 (0.4), August 7, 2001 (0.4), August 8, 2001 (0.1), August 13, 2001 (0.1), August 15, 2001 (0.5), August 21, 2001 (0.1), September 9, 2001 (0.4), September 10, 2001 (0.3), September 11, 2001 (0.3), September 12, 2001 (0.1), October 18, 2001 (1.6), November 2, 2001 (0.1), December 31, 2001 (0.4), February 4, 2002 (0.1), February 5, 2002 (0.3), February 6, 2002 (0.2), February 7, 2002 (0.2), February 20, 2002 (0.4), April 11, 2002 (0.2), June 11, 2002 (0.3), August 18, 2002 (0.3), August 21, 2002 (0.1), August 28, 2002 (0.2), and September 13, 2002 (0.3). The court also disallows the following from Mr. Huestis: August 9, 2001 (1.8), August 21, 2001 (0.3), August 31, 2001 (0.2), October 4, 2001 (0.8), October 8, 2001 (0.3), February 6, 2002 (1.7), September 6, 2002 (0.3, and September 11, 2002 (0.3). These generally cover categories of notification of case status to insurance carrier, research of time deadlines, and telephone conversations with media representatives concerning the case, which the court finds are not relevant to the legal

defense of Mayoue and Gray. In sum, the court disallows $1922 and allows $20,640.05 in attorney's fees for Defendants Mayoue and Gray.

II Conclusion

The court DENIES Mr. Hirsh's motion for clarification [89-1] or modification [89-2]; GRANTS Defendant Woods' motion for attorney's fees [90-1]; GRANTS Defendants Mayoue and Gray's motion for attorney's fees [91-1]; GRANTS Defendant Titelman's motion for attorney's fees [92-1]; GRANTS Defendant Chandler's motion for attorney's fees [93-1]; GRANTS Mr. Hirsh's motion for hearing [99-1]; and GRANTS Defendant Chandler's motion for leave to file sur-reply [100-1].

Mr. Hirsh and Mr. Ducote are DIRECTED jointly and severally to pay attorney's fees of $22,295 to Defendant Titelman, $26,333 to Defendant Chandler, $15,637.50 to Defendant Woods, and $20,640.05 to Defendants Mayoue and Gray. The total fees awarded are $84,905.55. These fees must be paid within fifteen (15) days from the date of this order or Mr. Ducote's *pro hac vice* admission to the United States

District Court the Northern District of Georgia is suspended.

SO ORDERED this 29th day of July 2003.

J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WENDY JANE TITELMAN,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	NO. 1:01-cv-1845-JOF
	:	
ANDREW CHARLES TITELMAN	:	
CRAIG CHANDLER, JOHN MAYOUE,	:	
PAMELA GRAY, DIANE WOODS,	:	
	:	
Defendants.	:	

JUDGMENT

This action having come before the court, Honorable J. Owen Forrester, United States District Judge, for consideration of defendants' motion(s) for attorney's fees, and the court having granted said motion(s), it is

Ordered and adjudged that defendant Titelman recover $22,295, defendant Chandler recover $26,333, defendant Woods recover $15,637.50, defendants Mayoue and Gray recover $20,640.05 from Mr. Hirsh and Mr. Ducote JOINTLY AND SEVERALLY as reasonable

attorney's fees.

Dated at Atlanta, Georgia this 29th day of July, 2003.

LUTHER D. THOMAS
Clerk of court

By: Andrea Gee, Deputy Clerk

Prepared, filed, and entered
in the Clerk's Office
July 30, 2003
Luther D. Thomas
Clerk of Court

By: Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-14429

D. C. Docket No. 01-01845-CV-JOF-1

MICHAEL R. HIRSH,
RICHARD L. DUCOTE,

Filed Jun 02 2005

Movants-Appellants,

versus

ANDREW CHARLES TITELMAN
CRAIG CHANDLER, et. al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(February 8, 2005)

Before BARKETT, MARCUS and SUHRHEINRICH*, Circuit Judges.

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*Honorable Richard F. Suhrheinrich, United States Circuit Judge for the Sixth Circuit, sitting by designation.

PER CURIAM:

Richard L. Ducote and Michael R. Hirsh, counsel for Plaintiff Wendy Titelman, appeal from the district court's order imposing sanctions on them pursuant to Rule 11 of the Federal Rules of Civil Procedure, and awarding attorney's fees in favor of Appellees.[1] Because the district court did not abuse its discretion, we affirm.

I.

This appeal stems from an underlying malicious prosecution action filed by Ms. Titelman in the United States District Court for the Northern District of Georgia, which in turn arose out of underlying divorce and child custody proceedings between Andrew and Wendy Titelman. The divorce decree awarded sole legal and physical custody of the Titelmans' two minor children to Mr. Titelman; Ms. Titelman received weekend and holiday visitation privileges. After Ms. Titelman

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2. This Court has granted Hirsh's motions to dismiss from his appeal, with prejudice, defendants Andrew Charles Titelman, Craig Chandler, and Diane Woods. In this decision, we affirm the district court's judgment as to the remaining parties.

failed to return the children following a scheduled visitation, Mr. Titelman swore out a misdemeanor arrest affidavit alleging that Ms. Titelman had interfered illegally with the child custody order. An arrest warrant was subsequently issued for Ms. Titelman for felony interstate interference with custody.

Ms. Titelman was subsequently tried on the felony charge. At the trial, Ms. Titelman moved twice for a directed verdict of acquittal. The trial court denied both motions, but the jury eventually found her not guilty.

Ms. Titelman then filed a malicious prosecution action against Mr. Titelman, Craig Chandler, John Mayoue, Pamela Gray and Diane Woods. Ms. Titelman claimed that the five defendants had conspired to initiate and maintain the prosecution in order to punish her for seeking to protect the children from Mr. Titelman's alleged sexual abuse and to protect those who covered up the alleged abuse. In support of these allegations, Ms. Titelman attached a copy of an undated letter written by six members of the jury to the Cobb County District Attorney and to the

Superior Court judge presiding over the custody case, stating those jurors' view that the prosecution had been improper.

The initial complaint was signed both by Ducote – a Louisiana lawyer admitted pro hac vice to the Northern District of Georgia to represent Ms. Titelman in her malicious prosecution case – and Hirsh, who was local counsel in this case and represented Ms. Titelman during the initial criminal trial.

At the discovery conference, the district court excluded the jury letter and all references to "the dispute over harassment of the children by the husband." The district court also entered a stay of discovery on all matters except those concerning the district attorney's office responsible for the prosecution. The court then required Ms. Titelman to present a more definite statement alleging the elements of the malicious prosecution tort under Georgia law and "what each defendant did that got them sued." The court explained that Ms. Titelman's case as pled was flawed fatally because (1) the criminal trial judge's denial of her motions for a directed verdict established probable cause for the

criminal prosecution, and (2) no information suggested that the state trial judge's rulings were corrupt or obtained by fraud.

Hirsh attended the discovery conference as local counsel, and Ducote attended by telephone. The district court explicitly warned both Hirsh and Ducote that the "allegations . . . will be reviewed carefully for Rule 11 violations. And I'm not absolving you of any that may have happened in the past, but I am pointing out to you that Rule 11 exists and you need to be very careful about what you allege." Indeed, the court warned Ducote and Hirsh several more times to be careful with their allegations "because you may be spending your own money," and advised Ducote that if he insisted on resubmitting the pleadings based on his suggested interpretation of Georgia malicious prosecution law, he was "liable to end up paying for [his[own entertainment." "If you want to protect yourself on Rule 11 sanctions," the court added, "read the law."

Ms. Titelman subsequently filed an amended complaint in large part unchanged from the original complaint, other than the addition of several vague allegations regarding the defendants' conspiratorial

behavior. Only Ducote signed the amended complaint, but the signature page included Hirsh's name, Georgia bar number, law firm, address, and designation as local counsel.

Appellees filed motions to dismiss the amended complaint and motions for Rule 11 sanctions. Meanwhile, Hirsh filed a notice of change of address identifying himself as counsel of record.

The district court granted Appellees' motions to dismiss the amended complaint. The district court also imposed Rule 11 sanctions, ordering Ducote and Hirsh jointly and severally to pay Appellees $84,905.55 in attorney's fees. After the district court awarded sanctions, Hirsh moved to withdraw as local counsel.

We affirmed the district court's dismissal of malicious prosecution action in a related appeal, Titelman v. Titelman, No. 02-14879 (11th Cir. Oct. 29, 2004); and we now affirm the district court's imposition of Rule 11 sanctions.

II.

We review for abuse of discretion the district court's imposition

of Rule 11 sanctions. Anderson v. Smithfield Foods, Inc., 353 F.3d 912, 915 (11th Cir. 2003). A district court may award Rule 11 sanctions when a party files a pleading: (1) without a reasonable factual basis; (2) on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; or (3) in bad faith for an improper purpose. Id.

In arguing that the district court abused its discretion to award sanctions, Ducote reiterates many of the same arguments he presented in Ms. Titelman's previous appeal of the dismissal order (Titelman, 02-14879). We rejected each argument in that appeal and reject them for the same reasons in this case.

To summarize the discussion in prior appeal, Goergia law requires a plaintiff claiming malicious prosecution to show, among other things, that the prosecution was instigated without probable cause. See Ga. Code Ann. § 51-7-40; Wal-Mart Stores, Inc. v. Blackford, 449 S.E. 2d 293, 294 (Ga. 1994). The criminal trial judge's denials of Ms. Titelman's motions for a directed verdict "constitute[] a binding

determination of the existence of probably cause," unless she alleged that the trial judge's rulings were obtained through fraud or corruption. Monroe v. Sigler, 353 S.E.2d 23, 25 (Ga. 1987). But Ms. Titelman's amended complaint failed to allege that the trial judge's rulings were obtained through fraud or corruption, despite the district court's instructing Ms. Titelman's lawyers to allege these facts with particularity and allowing her to conduct discovery on the Cobb County District Attorney's Office. The amended complaint, therefore, was without a reasonable factual and legal basis, even after the district court's warnings of the possibility of Rule 11 sanctions.[2]

Ducote's attempts to distinguish this case from Monroe are without merit. Monroe was decided by the Georgia Supreme Court, and thus controlled the district court's decision. See Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co., 362 F.3d 1317, 1318 (11th Cir. 2004) (stating that, in a diversity action, a federal court must apply substantive

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2. Because the amended complaint was without a reasonable factual or legal basis, we need not address Ducote's argument that he did not file the amended complaint for an improper purpose.

state law and "must decide the case the way it appears the state's highest court would") (citation and internal quotation marks omitted). None of the cases Ducote cites for support came from the Georgia Supreme Court; nearly all are from Georgia's intermediate appellate courts. A number of his citations are to dissenting opinions. Moreover, none of the decisions actually create the exceptions to Monroe that Ducote seeks to invoke. It is clear to us, and should have been clear to Ducote, that Monroe compelled the dismissal of the amended complaint. The district court did not abuse its discretion in sanctioning Ducote.

Hirsh argues that sanctions against him were not proper because Ducote was required to have local counsel sign all pleadings, and because Hirsh did not sign the amended complaint. The district court or Appellees' lawyers, Hirsh suggests, should have alerted Hirsh to this omission, after which the pleading could have been stricken if he still failed to sign the amended complaint. Because he claims he did not sign, submit, file, or later advocate the amended complaint, Hirsh asserts that he is not subject to Rule 11 sanctions and that he can not be held

responsible for Ducote's sanctionable conduct. Hirsh further contends that his status as local counsel was not necessary for Ducote to practice before the Northern District of Georgia, and thus that the district court should not have blamed him for "opening the door" for Ducote.[3]

Hirsh's arguments ignore the plain meaning of Rule 11 and his role in the larger case. Rule 11 allows for sanctions when a "paper" is "present[ed]" to the court, whether by "signing, filing, submitting, or later advocating." See Fed. R. Civ. P. 11(b). Hirsh appeared as local counsel. He signed the original complaint. He was present at the discovery conference and participated in depositions. The district court specifically warned him of the applicability of Rule 11 because the allegations in the initial complaint were untenable. Although Hirsh did not sign the amended complaint, he was listed in it as local counsel. He

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3. Hirsh also argues that he should not be sanctioned if either Ms. Titelman or Ducote prevails in his or her respective appeal. He further notes that the district court could grant his motion for exoneration -- pending at the time he filed his initial appellate brief – which would render his appeal moot. Since both Ms. Titelman's and Ducote's appeals have failed, and Hirsh's motion has been denied, these arguments are without factual basis.

filed a change of address notification after Appellees moved to dismiss the amended complaint, in effect reaffirming his status as local counsel. And he did not move to withdraw until after the district court imposed sanctions.

In other words, "[b]y appearing in this case, [Hirsh] affirmed to the court that the case had arguable merit. In this sense, it was as if [Hirsh] had refiled the complaint. To use Rule 11's words, he was 'later advocating' that the 'factual contentions [in the complaint] have evidentiary support.'" Turner v. Sungard Bus. Sys., Inc., 91 F.3d 1418, 1421 (11th Cir. 1996). And by agreeing to act as local counsel for Ducote, Hirsh was ensuring the district court that he was "professionally responsible for the litigation" and could "be held accountable if anything reflecting on the Court or an abuse of its process occur[red] during the course of the litigation." Sanders v. Russell, 401 F.2d 241, 248 (5tgh Cir. 1968).[4] We would ignore the purpose of Rule 11 – and Hirsh's

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4. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decision of the former Fifth Circuit handed down prior to October 1, 1981.

responsibilities as local counsel – were we not to affirm the district court's imposition of sanctions against him.[5]

Quite simply, because the district court did not abuse its discretion in imposing Rule 11 sanctions against Ducote and Hirsh, we affirm.

AFFIRMED.

A True Copy - Attested
Clerk U.S. Court of Appeals.
Eleventh Circuit

By: Deputy Clerk
Atlanta, Georgia

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5. Because we find that the amended complaint as filed raised no claim with a reasonable chance of success, we reject Hirsh's argument that the district court's imposition of sanctions was premature and should have been delayed at least until after discovery was completed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14429-BB

MICHAEL R. HIRSH,
RICHARD L. DUCOTE,

Filed APR 15 2005

Movants-Appellants,

versus

ANDREW CHARLES TITELMAN
CRAIG CHANDLER, et. al.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Georgia

Before: BARKETT, MARCUS and SUHRHEINRICH*, Circuit Judges.
PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

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*Honorable Richard R. Suhrheinrich, United States Circuit Judge for the Sixth Circuit, sitting by designation.

Supreme Court, U.S.
FILED
AUG 17 2005
OFFICE OF THE CLERK

No. 05-99

IN THE

Supreme Court of the United States

RICHARD DUCOTE,

Petitioner,

v.

ANDREW TITELMAN, CRAIG CHANDLER, JOHN MAYOUE, PAMELA GRAY and DIANE WOODS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JOHN MAYOUE AND PAMELA GRAY

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QUESTION PRESENTED

Whether the Eleventh Circuit correctly found the District Court did not abuse its discretion in imposing Rule 11 Sanctions where (a) the pleadings were set forth for improper purposes and harassment; (b) the legal theory advanced had no reasonable chance of success under decisional and statutory law, and no good faith argument was set forth to reverse, modify or extend Georgia law of malicious prosecution; and, (c) such sanctions were premised on the absence of any reasonable factual basis to assert a malicious prosecution action?

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Akins v. Warren, 258 Ga. 853, 375 S.E.2d 605 (1989) 8

Anderson v. Dist. Bd. of Trustees of Cent. Fl. Comm. Coll., 77 F.3d 364 (11th Cir. 1996) 12

Anderson v. Smithfield Foods, Inc., 353 F.3d 912 (11th Cir. 2003) 1

Atlantic Zayre, Inc. v. Meeks, 194 Ga. App. 267, 390 S.E.2d 398 (1990) 9

Bi-Lo, Inc. v. McConnell, 199 Ga. App. 154, 404 S.E.2d 327 (1991) 6

Booker v. Eddins, 183 Ga. App. 449, 359 S.E.2d 211 (1987), *overruled on other grounds, Cincinnati Insurance Company v. Premier Tractor and Trailer Repair, Inc.*, 192 Ga. App. 243, 384 S.E.2d 449 (1989) 6, 7

Davis v. Trusthouse Forte Hotels Worldwide, Inc., 195 Ga. App. 768, 395 S.E.2d 235 (1991) 8

Griffin v. Georgia Power Co., 186 Ga. App. 565, 367 S.E.2d 565 (1988) 8, 9

Cited Authorities

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Haile v. Pittman, 194 Ga. App. 105, 389 S.E.2d 564 (1989) 9

Kelly v. Serna, 87 F.3d 1235 (11th Cir. 2002) 8

Martin v. Reitz, 152 Ga. App. 854, 264 S.E.2d 305 (1980) 12

Melton v. La Calamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981) 11

Monroe v. Sigler, 256 Ga. 759, 353 S.E.2d 23 (1987) .....*passim*

Moses v. Revco Discount Drug Centers of Georgia, Inc., 164 Ga. App. 73, 296 S.E.2d 384 (1982) ... 11

Pelleteir v. Zweifel, 921 F.2d 1465 (11th Cir. 1991) 5

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INTRODUCTION

Attorney Ducote's Petition does not meet any of the Rule 10 criteria. Contrary to Attorney Ducote's contentions, the Eleventh Circuit in no way departed from "the accepted and usual course of judicial proceedings . . ." The law surrounding Fed. R. Civ. P. 11 relied upon by the Courts below is settled in areas pertinent to this Court's inquiry. Likewise, the degree of deference owed by the Eleventh Circuit to the District Court is clear: The Court of Appeals will "review for an abuse of discretion the District Court's imposition of sanctions under Rule 11." *Anderson v. Smithfield Foods, Inc.*, 353 F.3d 912, 915 (11th Cir. 2003), *citing Massengale v. Ray*, 267 F.3d 1298, 1301 (11th Cir. 2001).

Attorney Ducote's Petition focuses only upon the argument he attempted to modify the law of malicious prosecution in Georgia. The District Court found and the Eleventh Circuit agreed Rule 11 sanctions were also appropriately imposed on Attorney Ducote because the claims he submitted against the prevailing parties below were submitted for improper purposes, for harassment, and were devoid of any factual support. This is especially true as to Respondents Mayoue and Gray. Fed. R. Civ. P. 11(b)(1), (3). Even if the lower Courts' decision to impose sanctions was based solely on the unreasonableness of Attorney Ducote's legal argument to modify the law, that decision is well-supported. Attorney Ducote knew then and knows now his arguments for modification of such law were frivolous and intended only to cover his improper purposes and harassment.

STATEMENT OF THE CASE

The pertinent facts are set out in the Orders of the District Court and the Eleventh Circuit included in the Appendix to the Petition for Writ of Certiorari. These Respondents do not repeat those facts here, but pursuant to this Court's Rule 15.2, address Attorney Ducote's misstatements of fact and law.

First, he contends following the underlying state court criminal trial of Mrs. Titelman, "the jury sent a scathing letter to the District Attorney." (Petition, p. 4). This is untrue. As noted by the Eleventh Circuit, a juror sent a letter signed by five (5) other jurors. [53-A] Regardless, the District Court struck "all references or exhibits in the complaint relating to the correspondence by the jury and . . . to harassment of the children by Defendant Titelman . . ." [Record below, Vol. II-.40-pg. 2-4] That ruling stands unchallenged on appeal.

Next, Attorney Ducote claims that because Judge Flournoy found the question of reasonable doubt was for the jury, he made no finding "that the evidence is sufficient as a matter of law to support a conviction . . ." (Petition, p. 6) This an incorrect statement of fact and law. By denying Mrs. Titelman's motions for directed verdict, Judge Flournoy found, as a matter of law, sufficient evidence to enable the jury, as the trier of fact, to find each and every element of the guilt of the accused beyond a reasonable doubt. *Monroe v. Sigler*, 256 Ga. 759, 761, 353 S.E.2d 23, 25 (1987).

Next, Attorney Ducote wrongly claims the Eleventh Circuit "appears to adopt a blanket rule that it is *per se* improper to craft a legal argument from intermediate court opinions and dissents." (Petition, p. 9). The Eleventh Circuit

adopted no such rule. It had no obligation to point out *ad seriatim* why Ducote's construction of Georgia law of malicious prosecution is incorrect. The Eleventh Circuit correctly found his cited cases were neither factually nor legally controlling.

Attorney Ducote's most egregious mischaracterization comes from his claim that he has "simply attempted to reasonably advocate for his client." (Petition, p. 11) What Attorney Ducote did below, and what he continues to do now, is in no way reasonable. It is abusive. As the District Court found, the genesis of the suit against Respondents was to re-litigate and obtain discovery for the underlying divorce and child custody proceedings; wage a public relations campaign against the defendants; provide further publication of Mrs. Titleman's allegations of sexual abuse against her ex-husband; and, for other improper purposes unrelated to a malicious prosecution claim in Federal Court. [23-29-A]

Finally, Attorney Ducote never, despite embroiling these Respondents in litigation since July 13, 2001, and being instructed by the trial court to be specific, attributed one wrongful act to them. Attorney Ducote's conduct has been and remains extremely abusive, and Rule 11 sanctions were appropriately granted.

REASONS FOR DENYING THE PETITION

Rule 11 provides several alternative grounds for the imposition of sanctions. If "subdivision (b) has been violated" in any respect, the District Court, at its discretion, may "impose an appropriate sanction upon the attorneys . . . responsible for the violation." Fed. R. Civ. P. 11(c). Attorney Ducote violated subsections (b)(1), (2) and (3) as correctly

found by the District Court and affirmed by the Eleventh Circuit. Attorney Ducote's Petition does not address these other valid grounds for the imposition of Rule 11 sanctions: improper purpose, harassment, needless increase in the cost of litigation, and the absence of factual and evidentiary support. Fed. R. Civ. P.(b)(1), (3). His Petition only addresses his dissatisfaction with malicious prosecution law. Fed. R. Civ. P. 11(b)(2). Therefore, the Petition is inadequate and should be denied.

RULE 11 SANCTIONS WERE CORRECTLY IMPOSED FOR ATTORNEY DUCOTE'S HARASSMENT AND IMPROPER PURPOSES

Attorney Ducote and Mrs. Titelman pursued the malicious prosecution case to harass the Respondents. This is demonstrated by Attorney Ducote's continued reference here to documents and information which clearly had no relationship to the malicious prosecution action. The District Court struck the "jury letter," but Ducote continues to reference it. His reliance on the inflammatory allegation Mr. Titelman sexually molested his children was deemed irrelevant to the malicious prosecution action. Attorney Ducote continues to make the allegation.

The District Court cited to the letter from Attorney Ducote to the Members the Cobb County Bar and Metro Atlanta Health Professionals wherein he states that "we are taking it to the peers of those who are guilty, and we are charging those people to hold Diane Woods and Elizabeth King accountable. We will continue to fight in both State and Federal Court." [27-A] It was clear to the District Court Attorney Ducote was using the Federal forum in an improper manner by waging a "public relations campaign to discredit

her (Mrs. Titelman's) divorce and custody proceedings . . ." [28-A] Such improper use of the Federal forum gave rise to Rule 11 sanctions supported by *Aetna Ins. Co. v. Meeker*, 953 F.2d 328, 1334 (11th Cir. 1992) and *Pelleteir v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991). [23-28-A]

Attorney Ducote does not address any of these other clearly supported reasons (harassment and improper purpose) for the imposition of Rule 11 sanctions in his Petition. This failure alone warrants the denial of Ducote's Petition for Certiorari.

RULE 11 SANCTIONS WERE CORRECTLY IMPOSED FOR ATTORNEY DUCOTE'S FRIVOLOUS MODIFICATION ARGUMENT

Attorney Ducote's Petition focuses solely on the Georgia law of malicious prosecution in his attempt to justify the filing of the original and amended complaints against Respondents. His attempt to modify Georgia law was frivolous and unsupported and not the motivation for the Complaints. O.C.G.A. § 51-7-40 provides as follows: "A criminal prosecution which is carried on maliciously and without any probable cause and which causes damage to the person prosecuted shall give him a cause of action." In *Monroe v. Sigler*, 256 Ga. 759, 762, 353 S.E.2d 23 (1987), the Georgia Supreme Court granted certiorari to consider whether a judicial determination of probable cause made in the course of a criminal prosecution supports probable cause in a civil action for malicious prosecution. In *Monroe*, the defendant related events to the magistrate who issued an arrest warrant. *Id.* The plaintiff's counsel moved for directed verdict of acquittal at the close of her criminal trial. *Id.* Having heard all of the evidence, the trial court denied the

motion, finding the evidence sufficient to authorize a jury to determine guilt beyond a reasonable doubt. *Id.* On appeal the trial court's denial of the motion for directed verdict was found to constitute a binding determination of probable cause in the civil case:

> When the trial judge, having heard all of the State's evidence, considers a motion on behalf of the accused (the accused being present and given an opportunity to be heard in support of the motion); and when the trial judge rules that the evidence is sufficient as a matter of law to support a conviction (that is, it is sufficient to enable a rational trier of fact to find each and every element of the guilt of the accused beyond a reasonable doubt), we can see no reason why such a holding – unreversed and in the absence of fraud or corruption – should not suffice as to the existence of probable cause.

Monroe, 256 Ga. App. 761. *See also Bi-Lo, Inc. v. McConnell*, 199 Ga. App. 154, 404 S.E.2d 327 (1991) (the defendant in a malicious prosecution action is entitled to a judgment as a matter of law where the plaintiff was shown to have moved unsuccessfully for a directed verdict of acquittal in the underlying criminal proceeding). Where the facts are not in dispute in establishing probable cause, the question is for the Court to determine and not a jury. *Booker v. Eddins*, 183 Ga. App. 449, 359 S.E.2d 211 (1987), *overruled on other grounds, Cincinnati Insurance Company v. Premier Tractor and Trailer Repair, Inc.*, 192 Ga. App. 243, 384 S.E.2d 449 (1989).

> Probable cause in this regard may be defined as the existence of such facts and circumstances in

> the mind of a reasonable person, the reaction of those facts and circumstances upon the mind of such reasonable person, and the reasonable acting on the facts within the mind of the prosecutor, so as to cause a belief the person was guilty of the crime for which the prosecution was being pursued.

Id.

On Mrs. Titelman's motions for directed verdict at her criminal trial before Judge Flournoy, she argued the indictment was deficient, there was reasonable doubt as a matter of law, and an acquittal was required. [Vol. 2-Doc. 33-pg 6, 10] Judge Flournoy disagreed and denied the motions for directed verdict.[1] Judge Flournoy found the evidence authorized a jury to determine guilt beyond a reasonable doubt. The justification for allowing the trial judge to make that determination is straightforward: The quantum of evidence – beyond a reasonable doubt – is substantially greater than mere probable cause. *Monroe, supra*, 256 Ga. App. 761. Judge Flournoy's holdings, as a matter of law, established probable cause, thereby negating the essential element of the malicious prosecution claim brought against Respondents. Attorney Ducote was fully aware of these inescapable points of fact and law.

Attorney Ducote was then required to allege how Judge Flournoy's Orders (denial of motion for directed verdict)

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[1] Attorney Ducote erroneously implies Judge Flournoy found the motions had merit, but let the case go to the jury anyway. Judge Flournoy actually said Mrs. Titelman made a good case, "but reasonable doubt is for the jury." [Vol. 2-Doc. 47-Ex. 3- pg 13]

were procured by fraud or corruption. *Akins v. Warren*, 258 Ga. 853, 375 S.E.2d 605 (1989) (where a plaintiff cannot provide evidence, such as perjured testimony or other conduct amounting to intentional corruption of the criminal court, a denial of a motion for directed verdict conclusively shows that probable cause existed). Attorney Ducote has never attempted to discharge that obligation.

Rather, Attorney Ducote argues the criminal trial judge simply has too much discretion to foreclose a subsequent malicious prosecution action. These contentions were raised and decided in *Wingster v. Huntley's Jiffy Stores, Inc.*, 200 Ga. App. 252, 407 S.E.2d 481 (1991) and *Davis v. Trusthouse Forte Hotels Worldwide, Inc.*, 195 Ga. App. 768, 395 S.E.2d 235 (1991). These cases follow *Monroe v. Sigler* in holding denials of directed verdict motions in underlying criminal trials, in the absence of fraud or corruption, conclusively demonstrate probable cause. *See also Wolf Camera, Inc. v. Royter*, 253 Ga. App. 254, 558 S.E.2d 797 (2002); *Kelly v. Serna*, 87 F.3d 1235, 1241 (11th Cir. 2002).

Attorney Ducote cites the dissent in *Griffin v. Georgia Power Co.*, 186 Ga. App. 565, 567-568, 367 S.E.2d 565 (1988) for support. Judge Banke was concerned with what he considered to be the majority's extension of *Monroe v. Sigler*, so as to create

> an absolute bar to an action for malicious prosecution not merely in those cases where the criminal trial judge allowed the case to go to the jury over a motion for directed verdict, but also in those cases where, after initially refusing to direct a verdict of acquittal, the judge ultimately granted the motion.

Id. In the present case, Judge Flournoy refused to grant a directed verdict twice. Ducote's reach for support in the *Griffin* dissent fails.

Attorney Ducote points to the dissent in *Atlantic Zayre, Inc. v. Meeks*, 194 Ga. App. 267, 268, 390 S.E.2d 398 (1990). He fails to note *Monroe v. Sigler* was not controlling there "because the juvenile proceeding is totally other than and distinct from a criminal proceeding . . ." and there is "a crucial distinction between the posture of the accused juvenile . . ." in a juvenile proceeding, and the posture of a criminally accused adult at trial. *Id.* Again, Attorney Ducote's reach for support in a dissent fails.

Next, Ducote cites *Haile v. Pittman*, 194 Ga. App. 105, 108, 389 S.E.2d 564 (1989), and the dissent of Judges Benham and Beasley. Again, Ducote fails to note the reason for the dissent's minor departure from *Monroe v. Sigler.* Specifically, the dissent felt *Monroe v. Sigler* was inapplicable where at the underlying trial, "there was no proper motion for directed verdict, as the law does not provide for such in a bench trial . . ." *Id.* No motion for directed verdict was made in the underlying criminal trial in *Haile*, and thus *Monroe v. Sigler*, in the dissent's view, was inapplicable. In the present case, Plaintiff was not only given the opportunity to make motions for directed verdict, but did so twice.

Finally, Attorney Ducote relies on *Wolf Camera, Inc. v. Royter*, 253 Ga. App. 254, 558 S.E.2d 797 (2002). The plaintiff in *Royter* came forward with specific allegations of theft, showing the store manager failed to provide police with a "paid out" slip. This showed the plaintiff used the money that same day to purchase supplies from the store, conclusively demonstrating his innocence.

In the present case, despite the District Court's specific instruction to Ducote, he alleged no facts in the Amended Complaint to show Judge Flournoy's denials of Mrs. Titelman's motions for directed verdict were the product of fraud or corruption. Far from supporting any argument for the modification of malicious prosecution law in Georgia, *Royter* underlines Attorney Ductote's failure to come forward with any evidence Judge Flournoy's decisions were procured through fraud or corruption.

RULE 11 SANCTIONS WERE CORRECTLY IMPOSED FOR ATTORNEY DUCOTE'S FAILURE TO SET FORTH ANY EVIDENTIARY SUPPORT

Finally, Rule 11 sanctions are appropriate where, as here, the factual contentions are completely devoid of evidentiary support. Attorney Ducote has never cited one factual allegation of wrongdoing of Respondents, and does not address this ground for sanctions in his Petition.

Attorney Ducote fails to allege (for he cannot truthfully do so) Respondents played any role in the procurement of the warrants leading to Mrs. Titelman's arrest. He alleges no facts showing Mayoue or Gray instigated or caused the alleged malicious prosecution of Mrs. Titelman. The decision to prosecute her was for others to make. Attorney Ducote cites to no evidence (not even conclusory allegations or unwarranted deductions of fact) to show Respondents gave false or misleading information in connection with Mrs. Titelman's arrest. [Vol. 2-Doc. 39] He does not allege facts showing Mayoue and Gray unduly influenced the authorities in Mrs. Titelman's prosecution.[2] He makes no

[2] Attorney Ducote conducted the depositions of Cobb County District Attorney Patrick H. Head, Prosecuting Attorney Francie (Cont'd)

allegations Mayoue and Gray presented testimony at the Grand Jury hearing which led to Mrs. Titelman's indictment. He makes no allegations Mayoue and Gray testified at the trial of her criminal case. In fact, the Amended Complaint states no allegations Mayoue and Gray participated in *any* manner in the underlying criminal trial. Neither Respondent instigated the procurement of the warrants leading to Mrs. Titelman's arrest. [Vol. 2-Doc. 33]

Such facts as outlined above were essential to prove Respondents "instigated" the prosecution. *See Melton v. La Calamito*, 158 Ga. App. 820, 282 S.E.2d 393 (1981) (where a defendant provides no false information but merely states what he believes, leaving the decision to prosecute to the discretion of the officer, or the plaintiff is prosecuted for an offense other than the one charged by the defendant, the defendant is not regarded as having instigated the proceedings).[3] *Moses v. Revco Discount Drug Centers of Georgia, Inc.*, 164 Ga. App. 73, 74, 296 S.E.2d 384 (1982) ("statements made in good faith to police offices or others

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(Cont'd)
Hakes and Rose Wing of the District Attorney's office. Had there been any facts raised in those depositions implicating Mayoue and Gray in the instigation of the prosecution, those facts should have been alleged in the Amended Complaint.[Vol. 3-Doc. 79-pg 8]

[3] In the Amended Complaint, Attorney Ducote argues the District Attorney may have prosecuted Mrs. Titelman under the wrong code section. [Vol. 2-Doc. 39] Undisputedly, Mayoue and Gray cannot be held legally responsible for the District Attorney's decision as to the particular code section under which a charge against Mrs. Titelman was brought. *See Melton, supra.*

investigating criminal activity cannot be the basis for a tort action"). Moreover,

> [t]he law draws a fine line of demarcation between cases where a party directly or indirectly urges a law enforcement official to begin criminal proceedings and cases where a party merely provides facts to an official who then makes an independent decision to arrest or prosecute. In the former case, there is potential liability for false imprisonment or malicious prosecution; in the latter case, there is not.

Martin v. Reitz, 152 Ga. App. 854, 855-856, 264 S.E.2d 305 (1980).

Attorney Ducote failed to allege facts sufficient to establish that Respondents "instigated" Mrs. Titelman's prosecution. The action for malicious prosecution filed against them was devoid of factual merit. The District Court found that "[d]espite the Court's specific instructions to Plaintiff that she needed to plead with particularity why each Defendant was appropriately in the case, Attorney Ducote resorted to shotgun pleading in her Amended Complaint." [Vol. 3-Doc. 76-pg 4] This Court recognizes that term, *citing Anderson v. Dist. Bd. of Trustees of Cent. Fl. Comm. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996) (citation and punctuation omitted) and *Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1296 (11th Cir. 2002) Instead of setting forth factual allegations supportive of the malicious prosecution elements, Ducote merely alleged "all Defendants directly and jointly aided, counseled, and abetted the malicious prosecution." [Vol. 3-Doc. 76-pg 4] There is no explanation for how Respondents supposedly "directly and

jointly aided, counseled and abetted the malicious prosecution." [Vol. 2-Doc. 39] Indeed, as the District Court found, "Plaintiff was unable to associate a Defendant to any particular facts in her Amended Complaint despite the fact that the Court allowed her to engage in discovery with respect to the District Attorney's Office." [Vol. 3-Doc. 76-pg 5] Almost four (4) years later, Attorney Ducote still makes no such association.

CONCLUSION

Attorney Ducote's claims were presented for improper purposes, including to harass and to cause unnecessary trouble and expense for Respondents. He attempted to re-litigate his client's divorce and child custody proceedings under the guise of a malicious prosecution case. He resorted to a "sue 'em all'" strategy first. Second, when given an opportunity by the Court and its specific direction, he failed to state a case against Respondents. The District Court refused to let Attorney Ducote harass Respondents absent paying the price.

Attorney Ducote's claims and legal contentions were not warranted by existing law, are directly contrary to clear and well established law, and were not supported by any good-faith argument for the modification of the law. His contentions concerning his proposed modification of existing law are not supported by good faith arguments. He must now pay the price Rule 11 envisions and in fact requires. These Respondents request his Petition be denied.

Respectfully submitted,

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No. 05-99

Supreme Court, U.S.
FILED
AUG 17 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RICHARD DUCOTE,

Petitioner,

vs.

ANDREW TITELMAN, CRAIG CHANDLER, JOHN MAYOUE, PAMELA GRAY, AND DIANE WOODS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT ANDREW CHARLES TITELMAN'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did either the U.S. District Court for the Northern District of Georgia or the U.S. Court of Appeals for the Eleventh Circuit abuse its discretion in awarding or otherwise approving the imposition of sanctions against Petitioner Richard Ducote pursuant to Rule 11 of the *Federal Rules of Civil Procedure* pursuant to the circumstances of the underlying case?

INTERESTED PARTIES

Brinson, Askew, Berry, Siegler, Richardson & Davis
Chandler, Craig
Cauthorn & Associates
Cauthorn, Thomas
Cordle, Kristi
Davis, J. Anderson
Ducote, Richard
Gentry, Jerry L.
Gray, Pamela
Gresh, Jack G.
Hall, John E. Jr.
Hall Booth, Smith & Slover, P.C.
Heustis, Robert
Hirsh, Michael
Kanik, Beth W.
Mayoue, John
McDonald, James T.
Richard Ducote & Associates, P.L.C.
Sapp, Christopher
Swift, Currie, McGhee & Hiers
Titelman, Andrew Charles
Titelman, Wendy Jane
Woods, Diane
Warner, Mayoue & Bates, P.C.
Woods & Hamby

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CITATIONS TO OPINIONS AND ORDERS BELOW

Michael Hirsh and Richard Ducote v. Andrew Charles Titelman, et al., No. 03-14429, U.S. Court of Appeals for the Eleventh Circuit, February 8, 2005. Unreported. Rehearing denied, April 15, 2005.

Wendy Jane Titelman v. Andrew Charles Titelman, et al., Civil Action No. 1:01-CV-1845-JOF. September 17, 2001; July 29, 2003; July 30, 2005. Unreported.

JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of Georgia exercised jurisdiction over the underlying complaint for malicious prosecution and punitive damages pursuant to 28 U.S.C. § 1332. The District Court awarded sanctions to all Respondents pursuant to Rule 11 on July 29, 2003. The U.S. Court of Appeals for the Eleventh Circuit affirmed the District Court's Order on February 8, 2005. Petitioner subsequently sought a rehearing and rehearing *en banc*. These requests were denied on April 15, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to grant a writ of certiorari to review the decision rendered by the U.S. Court of Appeals for the Eleventh Circuit.

RELEVANT STATUTES

Rule 11, *Federal Rules of Civil Procedure*

O.C.G.A. § 51-7-40. A criminal prosecution which is carried on maliciously and without any probable cause and which

causes damage to the person prosecuted shall give him a cause of action.

STATEMENT OF THE CASE

This present action arises out of the criminal prosecution of Wendy Jane Titelman ("Ms. Titelman"), Petitioner's client, for Intentional Interference with Interstate Custody, *State of Georgia v. Wendy Jane Titelman*, Case Number 00-9-4681-40 (hereinafter, the "criminal case"). Respondent Andrew Titelman, her former husband, swore the initial misdemeanor arrest warrant as Ms. Titelman retained possession of their two minor children beyond the agreed upon visitation period, contrary to O.C.G.A. § 16-5-45(b)(1)(c). (R2-43-Ex. A) Thereafter, a felony arrest warrant for Interstate Interference with Custody was issued and a General Bill of Indictment handed down pursuant to the felony arrest warrant. (R2-43-Ex. B, C) A trial ensued before Judge Robert Flournoy, III, in State Court, Cobb County, Georgia. (R20-43-Ex. B, C)

At the conclusion of the State's evidence and again at the close of all evidence in the April 2001 trial, Ms. Titelman unsuccessfully moved for a directed verdict. (R2-47-Ex. 3-pg 1-12) These two motions for directed verdicts were denied by the Honorable Robert E. Flournoy, III. (R2-47-Ex. 3-pg 6, 10)

On July 13, 2001, Ms. Titelman filed a Complaint for Compensatory and Punitive Damages for Malicious Prosecution, naming Respondent Andrew Charles Titelman as a defendant. (R1-1) Ms. Titelman also named Mr. Titleman's attorneys, Mayoue and Gray, as defendants. (R1-1) Finally, Ms. Titelman named the Detective who

arrested her as a defendant. (R1-1) These Defendants jointly moved before Judge Owen Forrester for a discovery conference to address discovery problems and to advise the Court of their intent to move for dismissal. (R1-30) The Court granted Defendants' Motions. (R2-36)

At this discovery conference, the Court directed Petitioner and local counsel, Michael Hirsh, to file an Amended Complaint so as to allege facts that establish the prosecution was carried on maliciously and without probable cause. (R3-76) Petitioner was to allege facts to establish that Judge Flournoy's Orders denying Ms. Titelman's motions for directed verdicts were procured by fraud or corruption. (R3-76-13) Judge Forrester advised Petitioner that if he did not allege facts so as to establish that Judge Flournoy's Orders were procured by fraud or corruption, the Complaint would be subject to dismissal. (R3-76-13) However, the Amended Complaint drafted and filed by Petitioner nevertheless failed to allege facts that established how Judge Flournoy's denial of each motion for directed verdict were achieved through fraud or corruption. (R3-76-9) Each of the named Defendants subsequently moved to dismiss for failure to state a claim since Petitioner failed to show probable cause as he did not allege facts so as to establish that Judge Flournoy's denial of each motion for directed verdict was procured by fraud or corruption. (R3-76-13)

On August 8, 2002, the District Court granted all Respondents' motions to dismiss for failure to state a claim upon which relief can be granted, pursuant to *Federal Rule of Civil Procedure* 12(b)(6). (R3-76-13) On January 23, 2002, Respondents Mayoue and Gray filed Motions with the District Court for sanctions under Rule 11 of the *Federal Rules of Civil Procedure*. (R3-58) Respondent

Chandler's Motion for sanctions followed and was filed on January 25, 2002. (R3-59) Respondent Titelman's (R3-62), and Woods' (R3-71, 73) Motions for Sanctions followed shortly thereafter.

On September 17, 2002, Judge Forrester issued an Order granting Respondents' Motions for Sanctions, and awarded a total of $84,905.55. (1-A, Petitioner's Appendix) On July 29, 2003, Judge Forrester entered Judgment against Petitioner and Hirsh in the amount indicated above as sanctions under Rule 11 for pursuing a baseless claim. (31-A, Petitioner's Appendix)

This Order was subsequently upheld by the U.S. Court of Appeals for the Eleventh Circuit, in an Opinion dated February 8, 2005. (51-A, Petitioner's Appendix) The Eleventh Circuit also denied a later request for rehearing on April 15, 2005. (63-A, Petitioner's Appendix)

ARGUMENT

I. MALICIOUS PROSECUTION IN GEORGIA

Under Georgia law, "[a] criminal prosecution which is carried on maliciously and without any probable cause and which causes damage to the person prosecuted shall give him a cause of action." O.C.G.A. § 51-7-40. In order to prevail on a malicious prosecution claim, a plaintiff must show: "(1) prosecution for a criminal offense; (2) instigated without probable cause; (3) with malice; (4) under a valid warrant, accusation or summons; (5) which is terminated favorably to the plaintiff; and which (6) has caused damage to the plaintiff." *Kelly v. Serna*, 87 F.3d 1235, 1240-41

(11th Cir. 1996); *see also*, *Wal-Mart Stores, Inc. v. Blackford*, 264 Ga. 612, 449 S.E.2d 293 (1994).

The Supreme Court of Georgia has stated with particularity under what set of circumstances probable cause is established as a matter of law. *See*, *Monroe v. Sigler*, 256 Ga. 759, 353 S.E.2d 23 (1987). In *Monroe*, the Supreme Court of Georgia stated

> [w]hen the trial judge, having heard all of the state's evidence, considers a motion on behalf of the accused (the accused being present and given an opportunity to be heard in support of the motion); and when the judge rules that the evidence is sufficient *as a matter of law* to support a conviction (that is, sufficient to enable a rational trier of fact to find each and every element of the guilt of the accused beyond a reasonable doubt), we can see no reason why such a holding – unreversed and in the absence of fraud or corruption – should not suffice as to the existence of probable cause.

Monroe, 256 Ga. at 761, 353 S.E.2d at 25 (emphasis in original).

Petitioner has admitted that Ms. Titelman's two motions for directed verdict at her criminal trial were denied. (Brief for Petitioner, pps. 5-6) Georgia law in general, and *Monroe* specifically, clearly and uncontrovertedly hold that probable cause has been established as a matter of law. However, to avoid the application of *Monroe*, and a finding of probable cause as a matter of law, Petitioner was required to plead fraud or corruption in procurement of Judge Flournoy's Orders. Petitioner does not deny that he failed to plead fraud or corruption in the Amended Complaint. Petitioner does not contend that the

Court's dismissal of the Amended Complaint constituted error. Rather, he pleads that *Monroe* was inapplicable to this case and therefore, such allegations did not need to be plead. Further, he argues that his interpretation of *Monroe* was reasonable, such that it did not mandate the award of Rule 11 sanctions.

For reasons discussed *infra*, none of Petitioner's arguments withstand scrutiny. Petitioner was required to plead fraud or corruption in the procurement of Judge Flournoy's Orders to avoid a finding of probable cause as a matter of law. Petitioner has not shown that he could have reasonably and objectively interpreted *Monroe* as inapplicable. Petitioner's efforts herein constitute no more than an effort to provide Ms. Titelman with another forum, a higher and more public form, to dispute the custodial rights awarded to Respondent over their two children. Petitioner's efforts herein constitute no more than an effort to provide Ms. Titelman with another forum to dispute the custodial rights awarded to Respondent over their two children.

A. Judge Flournoy's Orders Denying Directed Verdict Imply that Evidence Was Sufficient as a Matter of Law to Support a Conviction

Petitioner first argues that the trial judge never specifically found that the evidence was sufficient as a matter of law to support a conviction when he denied Ms. Titelman's two motions for directed verdict. (Brief for Petitioner, pps. 6-7) In other words, he argues that Judge Flournoy did not really deny the motions for directed verdict. This argument is contrary to Georgia law and logic since its application would imply that any time a trial court denies a motion for directed verdict but fails to mechanically recite the standard of proof required to grant

the motion, the trial court's Order can be reversed for failing to issue a "definitive ruling."

Monroe does not state that a trial judge who denies a motion for directed verdict in a criminal trial must explicitly rule that the evidence is sufficient as a matter of law to support a conviction. Such a ruling is implicit in denial of a motion for directed verdict.

A motion for directed verdict is properly granted when there is insufficient evidence to authorize a rational trier of fact to find criminal defendant guilty of the crime for which they are charged beyond a reasonable doubt. *Jordon v. State*, 272 Ga. 395, 396, 530 S.E.2d 192, 194 (2000). Further, the *Monroe* rule has also been stated as follows:

> one of the essential elements of an action for malicious prosecution, the lack of probable cause . . . cannot be established as a matter of law if in the preceding criminal action the court denied the claimant's motion for directed verdict of acquittal and that ruling stands unreversed and untainted by fraud or corruption.

Wingster v. Huntley's Jiffy Stores Inc., 200 Ga. App. 252, 252, 407 S.E.2d 481, 482 (1991) (citations omitted).

Accordingly, it is clear that no decision issued by any Georgia court has required that any Judge use specific language in its order denying a motion for directed verdict. The court is only required to clearly express its denial, not the reasons underlying said denial. *Id.*; *Monroe*, *supra*.

Next, Petitioner argues that the trial judge's statements *when he denied the motion for directed verdict* "appear to acknowledge the reasonable doubt left by the evidence presented by the state" since Judge Flournoy complimented Petitioner's ability as an advocate for Ms.

Titelman. (Brief for Petitioner, p. 7)[1] This argument is legally and factually without merit. Legally speaking,

> [a] *trial court* cannot choose to deny a meritorious motion for a directed verdict of acquittal made at the close of the State's case. "[I]t constitutes reversible error for the trial court to refuse to direct a verdict of acquittal where there is absolutely no conflict in the evidence and the verdict of acquittal is demanded as a matter of law."

Griffin v. Georgia Power Co., 186 Ga. App. 565, 566, 367 S.E.2d 832, 833-34 (1988) (citations omitted) (emphasis in original).

Judge Flournoy, although complimentary of Petitioner, nevertheless refused to direct a verdict to Ms. Titelman since there was, in his opinion, a conflict in the evidence such that a verdict for acquittal was not demanded as a matter of law. The trial court therefore denied two motions for directed verdict that Petitioner filed on behalf of Ms. Titelman. It is immaterial that the trial judge was complimentary of the skill with which a losing argument was presented so long as the denial of the Motions were not alleged to have been procured by fraud or corruption.

B. Petitioner Fails to Show that His Argument that *Monroe* Was Distinguishable Was Based on Reason and in Good Faith.

Petitioner's claim that his arguments to distinguish *Monroe* constituted good faith attempts to extend, modify, or reverse current case law also lack merit.

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[1] Actually Judge Flournoy was complimentary of the skill of both Petitioner and the State's attorney. (Brief for Petitioner, p. 6)

1. The District Court was an inappropriate venue to argue the reversal or modification of *Monroe*

In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), this Court held that when federal courts exercise diversity jurisdiction, "the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie*, 304 U.S. at 78, 58 S. Ct. at 822, 82 L. Ed. at 1194. A few years later, this Court again stated that

> the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted.

West v. American Telephone & Telegraph Co., 311 U.S. 223, 236, 61 S. Ct. 179, 183, 85 L. Ed. 139, 144 (1940).

Erie and *West* have been the law of the land for more than six decades. If Petitioner wished that a court overrule *Monroe* to suit his needs, it was incumbent upon him to seek relief in Georgia's Supreme Court, not in the federal court system.

Monroe is a decision of Georgia's highest court and, as shown below, there are no signs which indicate that the Supreme Court of Georgia is considering modifying, changing, limiting or overruling that decision. Petitioner inappropriately chose federal court as a forum both to argue Ms. Titelman's claims for custody and in his effort to controvert the findings of probable cause although he

knew that no evidence existed to allege that Judge Flournoy's Orders were procured by fraud or corruption. Furthermore, there are no decisions by any Georgia state court which question, decline to follow, or limit *Monroe*'s holding that a denial of a directed verdict of acquittal at the criminal trial precludes a claim for malicious prosecution as a matter of law, absent evidence of fraud or corruption.

2. No exception to *Monroe* applies to Ms. Titelman's claim

Petitioner does not show that any exception to *Monroe*'s rule is factually analogous to Ms. Titelman's case and does not show that any Georgia court would failed to apply *Monroe* to the facts herein.

Petitioner cites to the dissent of *Griffin*, *supra*. However, a federal court exercising diversity jurisdiction cannot follow the logic of a dissent contained in Georgia Court of Appeals' opinions. Rather, it is constrained to follow the law as pronounced by the Georgia Supreme Court, i.e., *Monroe*. *See generally*, *Erie R.R.*, *supra*. Secondly, in *Griffin*, the plaintiff during the underlying criminal trial had made two motions for directed verdict. The first was denied, but the second was granted. *See*, *Griffin*, 186 Ga. App. at 565, 367 S.E.2d at 833. The majority decided to follow *Monroe*, which prompted the dissent to question whether *Monroe* should be followed *when the trial court granted a subsequent motion for directed verdict*. Moreover, the dissent only questions the application of *Monroe* when a subsequent motion for directed verdict has been granted; it does not question the validity of *Monroe*. *See*, *Griffin*, 186 Ga. App. at 567, 367

S.E.2d at 834 (*stating*, "I believe the majority's decision extends the holding in *Monroe v. Sigler* well beyond its intended parameters."). Petitioner's citation to this case is misleading and does not further his argument. *Griffin* is clearly distinguished on its procedural facts.

Petitioner next cites to the dissent of *Seven Hills Security, Inc. v. Dillingham*, 188 Ga. App. 1, 372 S.E.2d 1 (1988) as evidence that *Monroe* was again being attacked. *Seven Hills* presents the same factual underpinning as *Griffin*. The portion of the dissent which Petitioner quotes is not questioning the validity of *Monroe*, but rather the validity of *Griffin*, and how it may lead to a person escaping civil liability. *See*, *Seven Hills*, 188 Ga. App. at 2-3, 372 S.E.2d at 2 (*stating*, "This court cannot avoid the application of *Monroe v. Sigler* where only one motion for directed verdict is made and denied, but we need not unnecessarily extend it to situations where two motions for directed verdict of acquittal are made, with the first motion being denied and the second being granted.") Once again, this dissent does not question the validity of *Monroe* in situations such as the one at hand. Moreover, this dissent actually reinforces the continued applicability of *Monroe* to cases such as the one at hand.

Nor does *Atlantic Zayre, Inc. v. Meeks*, 194 Ga. App. 267, 390 S.E.2d 398 (1990) show that "*Monroe* is not the impenetrable fortress" which the lower courts held it to be, as Petitioner argues in his Brief. (Brief for Petitioner, p. 15) *Atlantic Zayre* and Ms. Titelman's claims are obviously distinguishable. The court in *Atlantic Zayre* was dealing with a juvenile case, not a criminal case. The court noted this difference, stating,

> [m]oreover, because the juvenile proceeding is totally other than and distinct from a criminal proceeding, . . . there is a real question as to whether the denial of a directed verdict for acquittal in a juvenile case, as distinguished from a criminal case, can be held to fall under the rubric of *Monroe v. Sigler*.

Atlantic Zayre, 194 Ga. App. at 269, 390 S.E.2d at 400.

Further, Petitioner both misreads and misunderstands the scenario presented in *Haile v. Pittman*, 194 Ga. App. 105, 389 S.E.2d 564 (1989). In *Haile*, the trial judge, hearing the case without a jury, denied the defendant's motion for a judgment of acquittal. Petitioner contends before this Court that the dissenters disagreed with

> the majority's application of *Monroe* because, as [Wendy Titelman argued in the underlying case,] the denial of the motion for directed acquittal was not premised on a specific finding that the state had at that time presented sufficient evidence of guilt to convict, as the trial judge expressed some uncertainty about the case.

Brief for Petitioner, p. 15.

However, Petitioner ignores the difference between the case at bar with the facts presented in *Haile*. In *Haile*, the majority applied *Monroe* to a situation where a judge, hearing a case **without a jury**, denied a criminal defendant's motion "for a judgment of acquittal." *Haile*, 194 Ga. App. at 105, 389 S.E.2d at 565. In dissent, two judges doubted whether *Monroe* should apply in the matter. Because there was no jury, **"there was no proper motion for directed verdict**, as the law does not provide for such in a bench trial because a verdict is the decision of a jury." *Haile*, 194 Ga. App. at 108, 389 S.E.2d at 567 (emphasis

added). Essentially, the dissenting judges question the applicability of *Monroe* to bench trials, but not the validity of *Monroe*. *Id.*

Petitioner next cites to *Wolf Camera, Inc. v. Royter*, 253 Ga. App. 254, 558 S.E.2d 797 (2002) for the proposition that should a civil plaintiff be able to show that the criminal prosecution was obtained through fraud, that *Monroe* is inapplicable. (Brief for Petitioner, p. 16) *Wolf Camera* merely reaffirms the *Monroe* exception to the finding of probable cause through a showing of fraud or corruption. *See*, *Monroe*, 256 Ga. at 761, 353 S.E.2d at 25. The *Wolf Camera* decision is an *application* of *Monroe*, not a *repudiation* of it, as Petitioner would argue. Further, in *Wolf Camera*, the civil plaintiff presented evidence of fraud which directly lead to the criminal charges. *Wolf Camera*, 253 Ga. App. at 258, 558 S.E.2d at 801. In this case, no evidence of fraud or corruption was even pled, much less presented, by Petitioner, which is the primary reason that sanctions were imposed. Rather than support Petitioner's contentions, *Wolf Camera* is yet another example of Georgia's faithful application of *Monroe*.

A similar finding is made in *Kelly v. Serna*, 87 F.3d 1235 (11th Cir. 2002), which Petitioner cites to for the proposition that a convicted plaintiff may recover for malicious prosecution upon a showing of fraud. (Brief for Petitioner, p. 16) This is a correct statement. However, the *Kelly* court cites to *Monroe* for that proposition. *See*, *Kelly*, 87 F.3d at 1241 (*stating*, "A jury conviction is conclusive of probable cause unless there was fraud. *Monroe*, 353 S.E.2d at 25").

Petitioner concludes by citing to *Blackford v. Wal-Mart Stores*, 17 F.3d 367 (11th Cir. 1994) for the proposition that

the law of probable cause in a malicious prosecution case is 'unsettled.' (Brief for Petitioner, p. 17) Petitioner's characterization of *Blackford* is misleading. In *Blackford*, the Eleventh Circuit Court of Appeals certified the following question to the Georgia Supreme Court: "In a suit alleging malicious prosecution of a criminal bad check charge that was dismissed by the court without trial, is evidence admissible that tends to prove plaintiff's guilt in fact of the offense and, if so proved, is guilt a bar to the malicious prosecution suit?" *Blackford*, 17 F.3d at 368. The question was certified because Georgia law *on this particular question* was unsettled, not Georgia law in general as to probable cause. *Id.* Further, the issue presented in *Blackford* is not presented by the facts *sub judice*.

After even a cursory reading of the seven cases cited by Petitioner, one is left with the inevitable conclusion that when a trial judge denies a properly heard motion for directed verdict in a case pending in a jurisdiction other than juvenile court, probable cause has been established as a matter of law absent a showing of fraud or corruption. *See, Monroe, supra; Griffin, supra; Seven Hills, supra; Atlantic Zayre, supra; Haile, supra; Wolf Camera, supra; Kelly, supra; Blackford, supra.* Petitioner knew *Monroe* and its progeny would apply, but took no steps to avoid its application. Thus, the Order granting Respondents' Rule 11 sanctions should be affirmed.

II. RULE 11 SANCTIONS

A. Text and Purpose of Rule 11

In pertinent part, Rule 11 of the Federal Rules of Civil Procedure states:

(a) **Signature.** Every pleading . . . shall be signed by at least one attorney of record in the attorney's individual name . . .

(b) **Representation to Court.** By presenting to the court . . . a pleading . . . an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, for after an inquiry reasonable under the circumstances, –

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions [set forth in the full text of the Rule], impose an appropriate sanction upon the attorneys, law firms, or parties

> that have violated subdivision (b) or are responsible for the violation.

Rule 11, FRCP.

A District Court may award sanctions (1) when a party files a pleading that has no reasonable factual basis; (2) when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; or (3) when the party files a pleading in bad faith for an improper purpose. *Massengale v. Ray*, 267 F.3d 1298, 1301 (11th Cir. 2001); *United States v. Milam*, 855 F.2d 739, 742 (11th Cir. 1988). In this case, the District Court granted sanctions based upon legal and factual insufficiency, as well as the fact that the litigation was initiated and maintained for the purpose of harassment. *See*, 17-A – 30-A, Petitioner's Appendix.

"The standard for testing conduct under amended Rule 11 is 'reasonableness under the circumstances.'" *Anderson v. Smithfield Foods, Inc.*, 353 F.3d 912, 915 (11th Cir. 2003). In the Eleventh Circuit, a court confronted with a motion for Rule 11 sanctions first determines whether the party's claims are objectively frivolous – in view of the facts or law – and then, if they are, whether the person who signed the pleadings should have been aware that they were frivolous; that is, whether he would have been aware had he made a reasonable inquiry. *Jones v. International Riding Helmets, Ltd.*, 49 F.3d 692, 695 (11th Cir. 1995). Finally, this Court reviews the District Court's grant of sanctions under Rule 11 using an abuse of discretion standard. *See, Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990).

B. Legal and Factual Insufficiency

As noted above, *Monroe* requires that a civil litigator whose motion for directed verdict was denied at a preceding criminal trial show that the denial was the product of fraud or corruption in order to maintain a cause of action for malicious prosecution. *See, Monroe, supra.* Both the District Court and the Court of Appeals for the Eleventh Circuit found that Petitioner had failed to allege that the criminal trial judge's denial of Wendy Titelman's motions for directed verdict were procured through fraud or corruption, even after being given specific opportunity to do so. *See generally,* Appendix to Petition. Due to Petitioner's inability to make proper *factual* allegations (fraud or corruption), his client's *legal* claims also became deficient (*Monroe*).

Further, as shown above, Petitioner cannot show that *Monroe* should be modified or not applied under the situation at hand. By all available evidence, no Georgia court would fail to apply *Monroe* to the situation presented by this case. Further, to the extent that Petitioner was arguing for a modification, extension, or reversal of existing *state* law, such an argument is also without merit. As described above, federal court is a totally inappropriate venue in which to argue for this kind of change to state law, as a federal court is bound to apply the law as pronounced by Georgia's Supreme Court. *See, Erie R.R., supra*; *West, supra. Monroe* is such a pronouncement. There is no indication that, under the facts presented by this matter, that any Georgia court would fail to apply *Monroe* as both the District Court and Eleventh Circuit did.

Petitioner first argues that the Eleventh Circuit failed to address the question of whether his arguments to distinguish *Monroe* were reasonable and nonfrivolous. (Brief for Petitioner, pps. 10-12) This is patently false. The Eleventh Circuit's opinion affirmed the District Court's imposition of sanctions. The District Court found that Petitioner's arguments violated Rule 11, in part because it was legally and factually insufficient. Petitioner does not address the validity of the District Court's action. As shown above, Petitioner's arguments before the District Court regarding *Monroe* were clearly frivolous.

Secondly, Petitioner fails to show that the Eleventh Circuit's Order affirming the District Court's award of sanctions was in error. The Eleventh Circuit noted that *Monroe* had to control the District Court's view of Georgia law, as it represents the pronouncement of Georgia's highest court on a question of law specifically brought by this case. (58-A – 59-A, Petitioner's Appendix) The Eleventh Circuit relied upon *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 362 F.3d 1317, 1318 (11th Cir. 2004) for the proposition that a federal court in a diversity action **must** decide the case the way it appears the state's highest court would. *Id.*; *see also, Erie R.R., supra*; *West, supra.* As Georgia law does not recognize the exception, neither can a federal court exercising diversity jurisdiction in Georgia.

As shown herein, the District Court's action was clearly within the wide net of discretion given to it by the Rules and this Court's precedent. *See generally, Cooter & Gell, supra.* Petitioner has not demonstrated otherwise such that this Court should reverse the lower courts' holdings.

C. Harassment

The District Court also found that Petitioner's claims were asserted for the purpose of harassment. *See*, 23-A – 30-A, Appendix to Petition. This finding was also affirmed by the Eleventh Circuit. *See generally*, 51-A – 62-A, Appendix to Petition. The District Court did not abuse its discretion by imposing sanctions on this theory either. Indeed, Petitioner seeks to further harass Respondents by using this high Court as another forum for his baseless allegations and to relitigate custodial issues.

The District Court held that the malicious prosecution proceedings were initiated and maintained in "an attempt to relitigate the issues involved in the underlying divorce and custody proceedings." 24-A, Appendix to Petition. The District Court took note of five pieces of evidence to support this determination: (1) Ducote's insistence on referring to the 'jury' letter, even after the District Court stated that it would not be taken into consideration by the court (24-A, Appendix); (2) Ducote's argument that the 'jury' letter somehow invalidated the criminal trial judge's denial of directed verdict (24-A – 25-A, Appendix); (3) Ducote's insistence on referencing baseless accusations against Mr. Titelman in regards to sexual misconduct toward his two daughters (25-A – 26-A, Appendix); (4) circumstantial evidence, including an open letter written to members of the Cobb County Bar and the Metro Atlanta Mental Health Professionals as well as Ms. Titelman's subsequent forwarding of that letter to "numerous people" with a statement attached thereto saying "[w]e will continue to fight in both state and federal court" (A-26 – A-28, Appendix); and (5) Ducote's attempt to "insert the limited discovery that took place in the instant litigation into her

ongoing divorce and custody proceedings." (27-A, Appendix)

Petitioner has made no argument that sanctions were impermissible on this basis. As Petitioner has not challenged the District Court's imposition of sanctions on this ground, Respondent Titelman deems it waived. This, alone, is sufficient reason to deny the Petition. Even if not waived, Petitioner has not, and cannot, show that it was an abuse of discretion to impose sanctions upon this basis.

III. NO COMPELLING REASON TO GRANT CERTIORARI

Certiorari should not be granted in this matter as the decisions of both the District Court and Eleventh Circuit were, as shown above, correct. In addition, this Court should not grant Certiorari in this case, as this matter does not present any compelling reason to do so.

Under this Court's Rule 10, petitions for a writ of certiorari "will be granted only for compelling reasons." *Supreme Court Rules*, R. 10. The Rules go on to state three situations in which a 'compelling reason' may be found. *Id.*

A compelling reason may be found where a Court of Appeals or other Court has issued a decision which creates a conflict or 'Circuit split.' *Supreme Court Rules*, R. 10(a). Petitioner has shown no such conflict, as neither the District Court's nor Eleventh Circuit's Opinions have created one.

The two remaining situations in which a compelling reason may be found are also not present here, as no important question of federal law has been stated by this case, nor does this case involve an opinion of a state court

on a question of federal law. *Supreme Court Rules*, R. 10(b) & (c).

Finally, the Rule states that this Court will "rarely" grant certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Supreme Court Rules*, R. 10. At best, Petitioner's position is essentially that the District Court and/or the Court of Appeals for the Eleventh Circuit misapplied properly stated rules of law and made erroneous findings of fact.

CONCLUSION

For the reasons stated in this Brief in Opposition, Respondent Titelman respectfully requests that this Honorable Court DENY Ducote's Petition for Writ of Certiorari.

Respectfully submitted,

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